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No. 80-182

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY J. CELEBREZZE, JR., in his official Capacity as Secretary of State of the State of Ohio,
Petitioner,

v.

JOHN B. ANDERSON, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF CASE

Petitioner seeks to invoke the extraordinary procedure of certiorari prior to judgment in the Court of Appeals. While important constitutional rights are surely involved in this litigation, the issues are hardly novel or of the "imperative" nature that has, in the past, justified this extraordinary writ.

On April 24, 1980, respondent John Anderson announced his independent candidacy for the Presidency and began efforts to secure placement of his name as an independent candidate for that office on the ballots of every state. Between May 10 and May 15 his supporters in Ohio gathered the required signatures and on May 16, tendered them to respondent. The tender was refused on the sole ground that the March 20 filing deadline had passed.[1] On May 19 respondents brought this action and, following briefing of cross-motions for summary judgment, and oral argument on June 26, 1980, the District

[1] By the parties' Joint Stipulation of Fact, Petr. App. 66-72, it is clear that Anderson is a serious and viable candidate with substantial community support.

Court in a 26-page opinion granted summary judgment for plaintiffs.

The District Court, correctly applying settled principles of constitutional analysis set forth in this Court's ballot access decisions ranging from *Williams* v. *Rhodes*, 393 U.S. 23 (1968) to *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979), concluded that Ohio's March 20 filing deadline for independent Presidential candidates was unconstitutional. Under Ohio law, while independent candidates for the office of presidency must submit all their nominating papers by March 20, partisan presidential candidates need not take any action in Ohio prior to receiving their party's nominations in late July or August. The District Court found that the March 20 filing deadline—earlier than in all but two other jurisdictions in the fifty states and District of Columbia—substantially burdened respondents' voting rights and First Amendment rights of association and expression, and invidiously discriminated against independent as opposed to partisan candidates for the Presidency.

In view of this burden and discrimination involving fundamental rights, the District Court held that the filing deadline could be justified "only if it is necessary to achieve a compelling state interest," and carefully considered the dual justifications offered by petitioner in its support: an interest in preserving political stability by assuring the "true" independence of independent candidates, and an interest in treating partisan candidates "equally" with independent candidates. With regard to the first, the District Court concluded that there was in fact "no interest served by the filing deadline other than its simple function as an arbitrary point in time when independent candidates must officially throw their hats into the political ring." Petr. App. 56. And it found the State's argument based on "equality" of treatment wholly unavailing "where the party candidates are not chosen until July or August and where all candidates must respond to national, not just state issues,"

with the "political parties hav[ing] an opportunity to respond to . . . shifting and emerging national issues after the State's [independent] filing deadline." *Id.* at 61. The District Court accordingly concluded that "neither the abridgement [of rights] nor the discrimination are justified by compelling state interests." *Id.* at 63.

Following judgment in the Court below petitioner filed his Notice of Appeal. Thereafter, on July 31, 1980 respondents moved for expedited consideration in the Court of Appeals, proposing that the parties adopt their briefs filed in the District Court with supplemental memoranda to be filed within seven days. Petitioner opposed this request for expedition and it was denied. On August 7 petitioner simultaneously filed in this Court a petition for writ of certiorari to the Sixth Circuit, prior to judgment in that Court, and a Motion to Expedite consideration of the petition. Pursuant to Order of the Chief Justice, respondents filed their response to the Motion to Expedite on August 11, 1980 indicating their willingness to proceed by an expeditious schedule for consideration of the petition for certiorari. By Order dated August 15, 1980, this Court denied petitioner's motion to expedite.

Ohio's March 20 filing deadline is one of five unusually early deadlines, falling in March or early April, that have been challenged by respondent Anderson in suits filed in federal court.[2] In each case, plaintiff Anderson and his supporters claimed that the unreasonably early filing deadline at issue was unconstitutional in two respects: first, that the remoteness of the deadline from the general election (seven to eight months) burdened fundamental rights in violation of the First Amendment, and second, that the deadline invidiously discriminated against independent candidates vis-a-vis partisan candidates in violation of the Equal Protection Clause.

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[2] The vast majority of states (thirty-three), including virtually every large state, have filing deadlines for independent Presidential candidates in August or September; almost all the other states have filing deadlines that fall in June or July.

Plaintiffs have prevailed in each case, and state officials have been ordered to place Anderson's name on the ballot. *See Anderson* v. *Hooper*, Civil No. 80-432-M Civil (D.N.M., July 8, 1980), (permanent injunction entered, August 12, 1980); *Anderson* v. *Morris*, Civil No. Y-80-1632 (D. Md., Aug. 6, 1980); *Anderson* v. *Quinn*, Civil No. 80-0176 P (D. Me., Aug. 11, 1980); *Anderson* v. *Mills*, Civil No. 80-18 (E.D. Ky., Aug. 14, 1980), all reprinted as appendices to this Brief in Opposition. In three of these other four actions—Maine, Maryland and New Mexico—the court held the early filing deadline at issue unconstitutional on both of the grounds asserted by plaintiffs. The Kentucky case was decided in favor of plaintiffs on state law grounds, but referred to the reasoning of the District Courts on the constitutional issues in the other cases cited as "persuasive." [3]

As of September 1, Congressman Anderson had been officially certified on the ballot in 27 states comprising 302 electoral votes; had complied with all requirements in 11 additional states and the District of Columbia and was awaiting the date of the ministerial act of certification in those jurisdictions; was conducting petition drives in 10 additional states; and was awaiting the statutory starting date to begin petition drives in the remaining 2 states.

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[3] In New Mexico defendants have not appealed. Defendants in Maryland, Kentucky and Maine have filed appeals to the respective courts of appeals. No other state challenges are currently outstanding except in North Carolina, where plaintiffs Anderson and his supporters prevailed on state law grounds in an action against the State Election Board to have his name placed on the ballot in that state, *Anderson* v. *Babb*, Civil No. 08-561-5 (E.D.N.C., Aug. 21, 1980), and where intervenor Democratic National Committee but not the State Board has filed an appeal.

SUMMARY OF ARGUMENT

I. No special circumstances are present that justify granting a writ of certiorari prior to judgment in the Court of Appeals. In reaching its result the District Court applied well-settled principles set forth as recently as this Court's decision in *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979). The only question decided below was the validity of Ohio's filing deadline in view of the particular interests advanced by the State in support thereof, and petitioner himself thwarted the probability that the case could already have been heard and decided by the Sixth Circuit.

II. The District Court correctly concluded that Ohio's early filing deadline for independent Presidential candidates burdens plaintiffs' fundamental rights, and discriminates against independents and in favor of partisan candidates in the exercise of those rights. It thus properly examined the statute to determine whether it was justified by any compelling state interests. Petitioner's contention that, before requiring the state to offer *any* justification for the early filing deadline, the Court should have required a showing that "reasonably diligent candidates" could not comply with its requirements, flows from a plain misreading of this Court's decisions in *Storer* v. *Brown*, 415 U.S. 724 (1974), and *Mandel* v. *Bradley*, 432 U.S. 173 (1977).

III. Ohio plainly discriminates against independent Presidential candidates by requiring them to file their nominating petitions and otherwise fully qualify for placement on the ballot by March 20, while at the same time imposing *no* requirement that partisan Presidential candidates take *any* action in Ohio until sometime in late August. Petitioner's argument, raised for the first time in his Petition for Certiorari, that the proper comparison is between independent candidates and political parties, does not eliminate the discriminatory impact of the filing deadline since supporters of an independent candidate

like respondent Anderson must effectuate their choice by mid-March while members of a political party are free until mid-summer to designate their parties' choice.

IV. Ohio's filing deadline for independent candidates was not intended as a mechanism to promote the integrity of the partisan primary process or to assure the "true" independence of nonpartisan candidates. It was designed simply to exclude nonmajor party candidates as part of a restrictive scheme condemned by this Court in *Williams* v. *Rhodes*, 393 U.S. 23 (1968), and in practice and effect does not promote goals of political stability. Even if the filing deadline could be regarded as a political stability measure, moreover, it would not meet the tests set forth in *Storer* v. *Brown*, *supra*: the filing deadline is discriminatory on its face and in its impact, there being no comparable requirement for partisan Presidential candidates, and the burden it imposes on fundamental rights far outweighs any minimal contribution it may make to the integrity of the partisan Presidential selection process.

V. This Court's summary affirmance in *Sweetenham* v. *Gilligan*, 409 U.S. 942 (1972), in no way controls disposition of this case. The three-judge court held that plaintiffs, who had taken no steps to comply with Ohio's filing requirements until after the state primary (four months after the filing deadline) were not entitled to relief because of their failure to do anything "at or before the time" when partisan candidates were chosen. The validity of the deadline itself was thus not ruled on. In addition, plaintiffs in *Sweetenham* could not and did not raise the Equal Protection challenge advanced by respondents: that requiring an independent Presidential candidate to file by March 20 while imposing no filing deadline on partisan Presidential candidates until the end of the summer is an invidious and unjustified discrimination.

ARGUMENT

I. This Case Is Not of Such Imperative Public Importance As to Justify Deviation from Normal Appellate Practice By Granting Certiorari Prior to Judgment in the Court of Appeals

Pursuant to Sup. Ct. R. 18, a petition for a writ of certiorari prior to judgment in the Court of Appeals "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." While respondents agree that important constitutional rights affecting their access to the political process are involved here, they do not agree that the issues are in any way novel or unsettled, or that the case presents the kind of "imperative" public concerns or need for urgency that have characterized this Court's prior exercise of this extraordinary power.

The public importance and constitutional novelty of the issues presented in the rare cases in which certiorari prior to judgment has been granted in the last thirty years was beyond question. As the Court is well aware, at the time of *United States* v. *Nixon*, 418 U.S. 683 (1974), this country was in the midst of a major constitutional crisis involving confrontations between the President, the Congress, and the Courts. The President's claim of an absolute privilege to withhold Presidential communications sought by judicial subpoena in a criminal trial was "contrary to the basic concept of separation of powers and . . . checks and balances . . . ." 418 U.S. at 704. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 579 (1952), issues of similar constitutional novelty and public importance were posed by the President's seizure of the nation's steel mills. The Court rejected an effort to sustain the seizure as an exercise of constitutional war powers, concluding that the President's action had in

effect usurped Congress' lawmaking function.[4] Finally, *Wilson* v. *Girard*, 354 U.S. 524 (1957), involved a challenge to the operation of a jurisdictional agreement between two sovereign nations, the United States and Japan, in connection with the jurisdiction of the Japanese courts to try an American serviceman.

These cases all involved a major issue of constitutional authority as between two or more branches of the Federal Government or an issue affecting the foreign policy of the United States and its relation with another sovereign. They are thus well within the scope of the "main purpose of granting the Supreme Court the rarely exercised power to take a case from a Court of Appeals before judgment . . . to make it possible for extremely important cases, in which the public interest required an immediate authoritative decision, to reach the Supreme Court without delay." Stern & Gressman, Supreme Court Practice § 2.3 (5th ed. 1978). Virtually all other instances in which this power has been exercised have similarly involved "cases of great constitutional significance and of extraordinary national importance for other reasons." *Id.* at § 4.21.[5]

While important constitutional rights are at stake here, the District Court did no more than apply well-established constitutional principles affirmed as recently as this Court's decision in *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979). The principles of analysis applied by the court below are those elucidated in that case, and numerous other decisions of this Court. *See, e.g., Williams* v. *Rhodes*, 393 U.S. 23

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[4] In that case, two justices noted their dissent from petitioners' failure to have sought review first in the Court of Appeals. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 937 (1952) (order granting certiorari) (Burton, J., with Frankfurter, J., mem. explaining vote to deny).

[5] One other category of case in which this power has been exercised is represented by the *New Haven Inclusion Cases*, 399 U.S. 392 (1970) (certiorari before judgment granted to review companion case to one already before the Court).

(1968); *Kusper* v. *Pontikes*, 414 U.S. 51 (1973); *Mandel* v. *Bradley*, 432 U.S. 173 (1977); *Storer* v. *Brown*, 415 U.S. 724 (1974); *American Party* v. *White*, 415 U.S. 767 (1974). And the District Court's analysis and decision are in harmony with the decisions of three other District Courts that have reached similar results in challenges to filing deadlines brought by respondent Anderson.

While Anderson's presence on the Ohio ballot is surely important,[6] the legal question decided below—whether Ohio's filing deadline was, in the context of Ohio election law, justified by the particular interests advanced by the State of Ohio in support thereof—entirely lacks the nationwide effect or impact of the presidential assertion of absolute privilege or an order of seizure of steel mills across the country. Reversal or modification of the Ohio decision will not necessarily have any impact on the other filing deadline cases decided on constitutional grounds since the issue in each case was whether the particular filing deadline was, in the context of that particular state's election laws, justified by the particular interests asserted by each state.

Finally, respondents respectfully submit that granting certiorari before judgment in this case would be a signal of encouragement for litigants who desire to bypass the ordinary appellate procedure and obtain review directly

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[6] Virtually any non-major party candidate, in any state, in a close election could arguably tip the balance between two major party contenders by gathering as little as one-half of one percent of the popular vote. Petitioner's argument that, because of Ohio's electoral votes and respondent Anderson's popularity immediate review by this Court is necessary to avoid throwing in doubt the results of the presidential election, would favor granting certiorari before judgment in a literal host of cases that have in recent presidential election years arisen concerning ballot access and ballot placement issues. In addition to cases discussed in the text, see, e.g., *McCarthy* v. *Kirkpatrick*, 420 F. Supp. 366 (W.D. Mo. 1976); *McCarthy* v. *Exon*, 424 F. Supp. 1143 (D. Neb. 1976); *McCarthy* v. *Tribbitt*, 421 F. Supp. 1193 (D. Del. 1976); *LaRouche* v. *Guzzi*, 417 F. Supp. 444 (D. Mass. 1976).

in this Court. There was simply no reason, in terms of timing, for petitioners to have sought to evade review in the Sixth Circuit. Indeed, in both the Maine and Maryland filing deadline cases, decided by the District Courts substantially later than the instant case, and in a North Carolina ballot access case decided on state law grounds only two weeks ago, expedited schedules for hearing in the appropriate Courts of Appeals were established and all three cases will be fully submitted, argued and ready for decision by September 9, 1980. It appears that the State seeks to evade review in the Sixth Circuit, not because of any practical urgency of timing but because it justifiably fears that the Sixth Circuit would agree with Judge Duncan's careful application of well settled principles of constitutional law and that this Court would thereafter deny plenary review of a District Court decision squarely affirmed by a Court of Appeals.[7]

For these reasons, and for reasons that follow, respondents do not believe that the criteria for granting certiorari pursuant to Sup. Ct. R. 17 have been met and *a fortiori* submit that the special criteria for granting certiorari prior to judgment pursuant to Rule 18 have not been met.

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[7] Petitioner has recently indicated in a Motion for Enlargement of Time filed in the Court of Appeals that, in the event this Court denies his current petition for certiorari prior to judgment, he wishes to have 30 days following such action in which to file a brief and appendix in the Sixth Circuit. Since appellees would thereafter have a similar time period in which to file their brief, such action by the Secretary of State would, in effect, waive his opportunity for pre-election appellate review by the Court of Appeals—suggesting again that petitioner simply does not believe he can prevail on appeal in that Court.

II. This Court's Decisions in *Storer* v. *Brown* and *Mandel* v. *Bradley* Do Not Hold that Restrictive Ballot Access Laws Must Serve Compelling State Interests Only If a Reasonably Diligent Candidate Could Not Meet The Requirements: Thus, There Is No Conflict Between The District Court's Decision And This Court's Decisions

Part II of the Petition asserts that the District Court engaged in a "flat assertion" that Ohio's filing deadline substantially abridged fundamental rights and that in so doing the Court was adopting an improper "per se" test of constitutionality inconsistent with this Court's decisions in *Storer* v. *Brown* and *Mandel* v. *Bradley*. These assertions are simply incorrect, and mischaracterize both the District Court's analysis and its result.

The District Court began by noting this Court's declaration that "[r]estrictions on access to the ballot burden two distinct and fundamental rights, 'the rights of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.' [*Williams* v. *Rhodes*, 393 U.S. 23 (1968).] *Illinois State Board* v. *Socialist Workers Party*, *supra*, 440 U.S. at 184," quoted at Petr. App. 36. The Court below specifically found that excluding Anderson from the ballot would abridge his First Amendment rights of expression, since "ballot placement may signal the political viability of a campaign and trigger funding, media coverage and credibility in the minds of voters." *Id.* at 37. The deadline also was found to deny respondents Laufman and others in Ohio who wished to vote for Anderson "the constitutional right to associate for the advancement of political beliefs" and the fundamental right to cast their votes effectively. The Court found that in view of the substantiality of support enjoyed by respondent Anderson across the country, "the number of persons in Ohio and elsewhere whose fundamental rights are implicated by the Ohio deadline is . . . substantial." [8] *Id.* at 39. These

[8] The Court also found that the voting rights of persons such as respondent Eisenstat, a New Jersey supporter of respondent Ander-

burdens, it found, fell with a discriminatory impact since partisan presidential candidates need not be chosen or designated until five months after independents must fully qualify for ballot access. *Id.* at 50-52.

In view of this impact on fundamental rights of voting and freedom of expression and association, the District Court, without holding that the statute was "per se unconstitutional," quite properly held that the filing deadline must be justified as necesary to serve compelling state interests. Notwithstanding that this very standard was articulated and applied by this Court in *Storer* v. *Brown, supra,* and recently reaffirmed in *Illinois State Board of Elections* v. *Socialist Workers Party, supra,* petitioner contends that the District Court should not have required the state to justify its statute *at all* unless it were first shown that the filing deadline could not be met by the "reasonably diligent candidate" under the factual inquiries set out in *Bradley* and *Storer.* This reading of *Bradley* and *Storer* is patently incorrect.

Storer v. *Brown* involved, in part, a constitutional challenge to California's requirements that independent candidates gather and file signatures of 5% of the prior electoral vote within a 24-day period 60 days before the general election. In holding that the trial court had erred in dismissing this challenge, the Court began its analysis by noting that, on their face, California's requirements imposed a burden on the ability of an independent candidate to gain ballot access. 415 U.S. at 740. Applying the

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son, would be diluted if one state, such as Ohio, were able to keep off its ballot a major presidential contender. *Id.* at 38. Contrary to petitioner's assertion, the District Court neither held nor suggested that all state filing deadlines must be uniform to avoid dilution of the rights of voters in other states. The Court noted the impact of the statute on voters in other states as one factor to be considered in determining the burden imposed by this unusually early filing deadline. As respondents argued below, the fact that the vast majority of other states have substantially later filing deadlines does not require identical deadlines in other states, but it *does* suggest that most states have not found it necessary to require independents to commit themselves as early as March 20.

compelling interest standard articulated earlier in its opinion, *id.* at 729, 736, the Court concluded that the factual record was insufficiently developed to permit an appellate decision whether, in fact, the requirements were necessary to serve a compelling state interest. As the Court held, the State "must justify its independent signature requirements chiefly by its interest in having candidates demonstrate substantial support in the community. . . . If the required signatures approach 10% of the eligible pool of voters, *is it necessary to serve the State's compelling interest in a manageable ballot to require* that the task of signature gathering be crowded into 24 days?" *Id.* at 743 (Emphasis added). It emphasized that the issue on remand was "whether it is *essential* to demonstrate community support to gather signatures of substantially more than 5% of the group from which the independent is permitted to solicit." *Id.* at 744.

As a measure, not of the constitutional standard to be applied but of whether the signature requirements together with the time deadlines were "essential" to serve the compelling state interest at issue, the Court set forth the factual inquiry into the ability of a "reasonably diligent candidate" that the State so misreads. *Storer* does not hold that only if a reasonably diligent candidate cannot meet the requirements must the State adduce some compelling interest that is served; rather, it holds that even a compelling interest in requiring demonstrated community support will not justify signature requirements that a reasonably diligent candidate cannot meet. Thus, if a reasonably diligent candidate is unable to obtain the necessary signatures in the time period specified, then the means which the State has chosen to implement its compelling interest are not sufficiently well-tailored to justify the restriction as necessary to achieve the State's goal.

In *Mandel* v. *Bradley*, 432 U.S. 173 (1977), plaintiffs had tried but failed to obtain the required number of signatures on nominating petitions by the filing deadline.

Thus, in *Bradley* as in *Storer* this Court was called on to determine whether the petition signature requirements, in combination with particular time limitations for meeting those requirements, were so burdensome that they were not well-tailored to meet the interest advanced by the State in preventing frivolous candidacies by requiring independent candidates to demonstrate a modicum of community support. The Court held that such an inquiry is essentially factual: if a petition requirement cannot be met in the time periods specified by the State by a "reasonably diligent candidate," looking at such factors as the size of the pool from which signatures can be drawn as well as the time allowed in which to circulate petitions, then it cannot be sustained as "necessary" or "essential" to the State's concededly compelling interests in requiring a demonstration of community support. *Storer* v. *Brown*, *supra*, 415 U.S. at 740, 743-44.

That *Storer* did not reject the compelling interest standard for ballot restrictions is confirmed by the contemporaneous decision in *American Party* v. *White*, *supra*, 415 U.S. at 780. Writing for the eight-man majority, Justice White, who also wrote for the majority in *Storer*, said:

> "We agree with the District Court that whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discriminations against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests."

See id. at 781, n.11, citing *Kusper* v. *Pontikes*, 414 U.S. 51, 56-59 (1973) (applying the compelling state interest requirement). And this Court's most recent ballot access decision, *Illinois State Board of Elections* v. *Socialist Workers Party*, *supra*, 440 U.S. at 184, clearly held that "[w]hen such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest." The opinion nowhere refers to the "reasonably diligent candidate,"

and its entire structure, reasoning and holding make clear that a compelling state interest is required to justify restrictive ballot access laws, particularly where, as here, a statute imposes a discriminatory burden on independent candidates not required of partisan candidates.[9]

Thus, the Court below was plainly correct in its conclusion that the reasonably diligent candidate inquiry was not a threshold to be passed before a compelling state interest need be shown but was instead a guide to the determination of those "facts relevant to the legal questions raised by the petitions in *Storer*," that is, whether the particular signature gathering and filing requirements were reasonably necessary to serve the asserted interest in requiring a demonstration of community support.[10] As the Court below pointed out,

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[9] As Judge Gignoux pointed out in the Maine filing case, the reasonably diligent candidate standard

> enunciated in *Storer* and *Mandel* plainly has no application to this case. What the lower courts were called upon to determine in those cases was whether the State's method for assuring that a candidate had a "significant modicum of support," *Jenness* v. *Fortson*, 404 U.S. 431, 442 (1971), was unduly burdensome. In the present case, there is no dispute that Congressman Anderson has sufficient community support to merit placement on the ballot. Nor do plaintiffs claim that the nominating procedures themselves are unduly burdensome. The only issue is whether the State can require an independent candidate for President to begin to pursue his candidacy in Maine before April 1 and to require no equivalent effort by the nominees for president of political parties.

Anderson v. *Quinn, supra*, Rspt. App. 5a-6a n.6.

[10] Petitioner seeks to avoid the clear impact of this Court's consistent holdings that restrictive ballot access laws must be justified by compelling state interests by suggesting that in *Storer*, this test only applied to a disaffiliation statute. Cert. Petn. 8. As indicated above, petitioner's reconstruction of *Storer* is belied by a reading of the opinion itself, as is the astonishing assertion that *Illinois State Board* did not involve First Amendment issues. *Comp.* 440 U.S. at 183-86. Equally astonishing is petitioner's assertion that *Illinois State Board's* Equal Protection analysis has no bearing here. Respondents have consistently argued that Ohio's filing deadline discriminates against independent presi-

> "[A] 'reasonably diligent candidate' could meet the deadline within the meaning of *Storer*, and the deadline could still be constitutionally unsound. For example, if Ohio were to set the filing date in November of the year preceding the general election and require only 100 signatures to qualify for ballot placement, most candidates who had by November decided to run for office would presumably be able to acquire enough signatures, and defendant's *Storer-Bradley* "threshold" test would apparently be satisfied. That fact, however, would not preclude the Court from inquiring whether the State has a compelling state interest in requiring a potential candidate to commit himself so far in advance of the general election." Petr. App. 50-51.

The thrust of petitioner's argument for certiorari is that the District Court should never have reached the question whether Ohio's discriminatory and burdensome early filing deadline is justified by *any* state interest. But the "reasonably diligent candidate" standard was never intended to supplant the requirement that ballot access restrictions burdening fundamental rights must serve important state interests, or to impose some threshold barrier to adjudication of whether such interests are in fact served. The District Court properly applied decisions of this Court, which require a determination of whether there are valid state justifications for such an early filing deadline, and there is thus no reason for this Court to review that decision.

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dential candidates vis-a-vis party candidates who, the State has conceded, need take no steps to establish their candidacy in Ohio prior to receiving their party nominations in the late summer—four to five months after independent candidates must fully qualify for the Ohio general election ballot. And the District Court plainly rested its finding of unconstitutionality not only on the burden imposed by the early filing deadline on respondents' First Amendment and voting rights but also on its discriminatory application.

III. The District Court Correctly Found that Ohio Law Invidiously Discriminates Against Independent Presidential Candidates By Requiring Them To Fully Qualify For Ballot Access Four to Five Months Before Partisan Candidates for the Same Office Are Required to Qualify.

Petitioner persists in its argument that Ohio law in fact treats partisan and independent candidates equally and raises for the first time in this Court a new argument that the proper comparison to be drawn is between independent *candidates* and political *parties*, rather than between the candidates themselves. Neither rationale, however, can overcome the undeniable fact that Ohio's statutes governing ballot access by partisan and independent candidates do accord grossly disparate treatment to the two classes of presidential candidates. Nor should they obscure Ohio's failure in the District Court and here even to suggest a state interest justifying this discrimination.

The State first argues that there is no discrimination because while independent candidates must fully qualify for the general election 75 days before the party primaries, partisan candidates must on that same date cause convention delegates pledged to their support to file nominating petitions. However, as the District Court correctly found, Ohio does *not* require a partisan candidate who may ultimately obtain his party's Presidential nomination and appear on Ohio's ballot to run in its state primary, to nominate any convention delegates, or even to have declared his candidacy by the time the June primary is held. As respondents demonstrated in their Historical Appendix below, recent history abounds with instances where the party Presidential nominee was not even a declared candidate at the time of the early filing deadline here in question, *e.g.*, Hubert Humphrey in 1968. Thus, the court below properly rejected the State's claim that it was in fact treating the partisan and independent candidates themselves equally, noting that

> "The Ohio statutes require the independent to commit himself early in the election year to his independent candidacy and grant the parties, both major and minor, until late August to choose their candidates. Regardless of the likelihood of such an occurrence, the statutes do permit a partisan candidate to receive the nomination of his party and thereby appear on the Ohio general election ballot in November without previously having had to file with the Secretary of State." Petr. App. 43.

Ohio's statutory scheme, in short, recognizes that in the case of political parties, issues and personalities may emerge toward the end of or even after the nationwide primary and caucus process. And it permits the parties considerable flexibility and leeway during the summer months to select their candidates from among shifting intra-party coalitions vying for support against each other. However, Ohio denies such flexibility to independent presidential candidates who must commit themselves to pursue the Presidency by March 20 or be irrevocably banned from Ohio's general election ballot. Whatever discrimination may be involved in requiring independent candidates for statewide office to file at the same time as partisan candidates for those offices—offices for which the partisan candidate is in fact chosen through the primary—the discrimination worked against independent Presidential candidates is far greater because partisan Presidential candidates need not win or even run in Ohio's June primary and in fact need not do anything to qualify for access to the general election ballot in Ohio until four or five months after independents must declare their candidacies and file their signatures.

Without abandoning his contention that partisan and independent presidential candidates are somehow treated equally, petitioner now contends for the first time that the District Court should have focused its comparison on political *parties* and independent *candidates*.[11] Since this

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[11] The District Court did recognize and discuss at length this Court's observations that the states may and in some instances

matter was not urged or considered below, this Court would be more than justified in refusing to consider this argument for the after-the-fact rationale that it plainly is. *Miree* v. *DeKalb County, Ga.*, 433 U.S. 25, 33-34 (1977); *Tennessee* v. *Dunlap*, 426 U.S. 312, 316 n.3 (1976).[12]

However, whether the comparison is made between candidates or between political parties and supporters of independent candidates, the same result obtains. Under Ohio law, those persons associated as a political party retain, collectively, the freedom to designate the party's choice until the time of the party convention. Those persons, like respondents Laufman, Hetrick and Eisenstat, who wish to associate, not for the purpose of forming a political party but for the purpose of promoting election of an independent candidate, such as respondent Anderson, and of his political program and

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must treat independent and partisan candidates differently, *see, e.g.*, *Jenness* v. *Fortson*, 403 U.S. 431, 441-42, (1971), and carefully considered both the differences and similarities between independent and partisan candidates and the methods for ballot placement afforded by Ohio law. *See* Petr. App. 44-46. As the Court explained, "[N]otwithstanding the extreme importance of the partisan candidate's affiliation with the support superstructure and machinery of a political party, a critical element of his success or failure at the general election is the personal constituency which must rally to his cause . . . . Likewise an independent candidate looks to develop a constituency that is attracted to him as an individual as well as to his stance on the issues." *Id.* at 45. While recognizing that "[o]ne cannot compare for all purposes the independent candidate with the candidate who conducts his campaign within the party system . . . . It seems equally clear . . . that statutory line-drawing that operates to abridge fundamental rights of some persons must be explicable in terms of differences between the persons on either side of the line." *Id.* The Court concluded that independent and partisan candidates were sufficiently similar that the difference in filing deadlines had at least to be justified.

[12] Petitioner's effort to raise a new ground in support of its position below is particularly inappropriate in view of its refusal to seek expedited review in the Court of Appeals so as to permit this Court the benefit of the appellate court's views on this new line of argument.

ideas, are required by Ohio law to have made and effectuated their choice in terms of ballot access for the general election by March 20. Whichever way the comparison is drawn, then, it appears plain that Ohio law draws an unconscionable distinction between the independent and partisan Presidential candidates.

In an effort to create a cert-worthy issue, the State suggests that under the District Court's reasoning "any filing deadline which fell in advance of the national party conventions" would be unconstitutionally discriminatory. Cert. Petn. 19. *See also id.* at 16. However, the District Court nowhere suggested and respondents do not argue that any filing deadline for independent candidates that falls before the time when party candidates are nominated is necessarily unconstitutional. For example, evenhanded administrative requirements for verifying independents' petition signatures involving challenges may justify a filing deadline days or even weeks in advance of the date when partisan candidates achieve placement on the ballot. But no such interests were advanced below by petitioner nor are any such interests advanced before this Court.[13]

In sum, here, as in Maryland, New Mexico and Maine, state law places grossly discriminatory requirements on independent candidates vis-a-vis partisan candidates as to when they must declare their candidacies to qualify for ballot access. Under well-established equal protection

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[13] Petitioner's ultimate suggestion that "independent candidacies and partisan candidacies are in salient ways so completely dissimilar that the comparison for the purpose of determining the existence of a violation of the guarantee of equal protection is nearly meaningless" is strikingly inconsistent with numerous decisions of this Court and of the lower federal courts, *see, e.g., Williams* v. *Rhodes, supra; Illinois State Board of Elections* v. *Socialist Workers Party, supra; Toporek* v. *South Carolina State Election Comm'n*, 362 F. Supp. 613 (D.S.C. 1973) (three-judge court); *McCarthy* v. *Noel*, 420 F. Supp. 799 (D.R.I. 1976), and indeed, with petitioner's own position below that the March 20 filing deadline for independent candidates was necessary to assure equality of treatment with partisan candidates.

analysis, it is this difference in requirements that must be justified by a compelling state interest in order to sustain the different treatment involved. Here, as in those other states, petitioners advance *no* compelling state interest whatsoever for the *difference* in treatment. And, here, as in Maryland, New Mexico and Maine, respondents submit that the District Court was plainly correct in holding this failure to be fatal to the validity of the filing deadline as applied to independent candidates for the Presidency.

IV. The District Court Correctly Determined That Ohio's Filing Deadline Was Not Intended to And Does Not Serve the State's Concededly Compelling Interest in Preserving Political Stability.

Petitioner made no effort in the District Court to justify its filing deadline on legitimate grounds of administrative necessity, conceding that the independent nominating petitions are not even forwarded to the boards of elections for the first step in processing until June 15, three months after the filing deadline and a month after Congressman Anderson's supporters tendered their petitions. Nor has petitioner sought to justify the filing deadline as necessary to serve its interests in requiring independent candidates to demonstrate substantial community support, an interest served and met in this case by the petition signature requirements. Thus, the only interest currently asserted in support of the filing deadline is that of promoting political stability by assuring the true independence of persons running as nonpartisan candidates for office by requiring them to make an early choice of whether to run as an independent. In so arguing, however, petitioner simply ignores the District Court's findings of fact that Ohio's filing deadline was not intended to and does not function to serve political stability interests.

When fundamental rights are at stake, this Court has made clear that legislation to limit them must stand or fall on the actual intentions of the legislation, not after-

the-fact rationalizations by counsel. As this Court has often emphasized, "This court need not in equal protection cases accept at face value assertions of legislative purposes when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 649 n.16 (1975); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974).

Although the court below specifically recognized *Storer's* holding that a "state has . . . a legitimate and compelling interest in maintaining the stability of its political processes," it found that the Ohio deadline was not intended to serve that interest. As the Court noted: "The statute gives absolutely no indication on its face that it was intended to be a disaffiliation provision." On its face, the filing deadline is just that—a filing deadline, and not a disaffiliation, "sore loser" or other requirement more directly designed to serve the goals of protecting political stability. *Accord*, *Anderson* v. *Quinn*, *supra*, Rspt. App. 7a-8a. Indeed, Ohio has a separate "sore loser" statute to serve its interest in the integrity of its party primaries, Ohio Rev'd Code § 3513.04, which Congressman Anderson fully satisfied and which petitioner concedes does not bar his independent candidacy.[14]

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[14] Petr. App. 68, ¶ 6, 7; Ohio Rev'd Code § 3513.30 (permits presidential candidates to withdraw from primary up to 30 days before). Orginally, the State's principal argument in the court below was that the filing deadline served "political stability" goals because it had been intended to work in tandem with the "sore loser" provision, § 3513.4. The State's claim that the two were intended to work as part of a comprehensive scheme was based on the proposition that the sore loser provision was intended to apply only to those nonpartisan offices and write-in candidates not covered by the early filing provisions of § 3513.257. As respondents demonstrated below, however, the State's purported interpretation of its sore loser provision was inconsistent not only with the plain language of its statutes but also with every Ohio state court decision and Attorney General opinion on the subject. Moreover, the sore loser provision was enacted in 1923, 110 Ohio Laws 131, over one-

The State's assertion of a political stability purpose for its early filing deadline is also belied by both its legislative history and by other provisions of state law. Until 1951, Ohio's filing deadline for independent candidates was 60 to 90 days before the general election. In that year, it was changed from 90 days before the general election to 90 days before the primary. 124 Ohio Laws 673. At the same time, many other changes were made in Ohio's ballot access laws. 123 Ohio Laws 380; 123 Ohio Laws 673. As this Court thereafter held in *Williams* v. *Rhodes*, 393 U.S. 23 (1968), these changes were not motivated by any legitimate or compelling state interest but rather were a direct reaction to the 1948 independent Presidential candidacy of Henry A. Wallace and had the purpose and effect of eliminating independent candidacies in Ohio for the next 20 years. Although Ohio's ballot access provisions were modified after having been declared unconstitutional in *Williams* v. *Rhodes*, *supra*, they were struck down again in *Socialist Labor Party* v. *Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom. Sweetenham* v. *Gilligan*, 409 U.S. 942 (1972), where the court observed that "the post-*Williams* amendments to the election laws merely perpetuate the restrictive laws enacted between 1948 and 1952." *Id.* at 1269. Ohio's laws have again been amended but, as the Court below found, the early filing deadline "emerged virtually unscathed," a remnant of the restrictive scheme held unconstitutional in *Williams* v. *Rhodes*. Petn. App. 34-35.

Ohio's political stability argument obscures the fact that the Ohio General Assembly *has* made legislative and political judgments in the context of Ohio's electoral scheme as to what provisions were necessary to protect the integrity of the primary process and to assure the

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quarter of a century before Ohio first moved its filing deadline for independents to a date before the primary. At oral argument, the State virtually abandoned its claim relating to this alleged state interest, and the District Court rejected the argument with little discussion. Petr. App. 55-56 & n.8.

true independence of nonpartisan candidates. These interests are implemented in a sore loser clause that is precisely tailored and that does not bar Congressman Anderson from Ohio's general election ballot. The filing deadline, on its face, as well as in view of its history, was not intended to serve those purposes.

Not only was the statute not intended to serve these goals but it does not serve them in practice. As the Court pointed out, "Anderson apparently could run in the other 49 states as a Republican and RC 3513.257 would not bar him from running as an independent in Ohio so long as he filed here as such by March 20." Petr. App. 54. Indeed, had Congressman Anderson made his decision to pursue an independent candidacy in March, notwithstanding his participation in other state Republican primaries, or his receipt of federal matching funds as a primary contestant, he would have been fully eligible for the ballot in Ohio.

An early filing deadline thus bears no logical relationship to the character of the candidate as a true independent or to the concerns noted by this Court in *Storer* as justifying California's one-year disaffiliation provision. As Judge Gignoux pointed out in rejecting a similar argument advanced in support of Maine's April 1 filing deadline, a "deadline is wholly ineffective as a disaffiliation provision. On its face, it does not prohibit candidates affiliated with a political party, like Anderson, from running as independents as long as they meet the deadline. And it does prohibit genuinely unaffiliated candidates from running as independents if they fail to meet the deadline." *Anderson* v. *Quinn*, *supra*, Respt. App. 8a.[15] As a purported mechanism to assure political stability by assuring true independence, then, the filing deadline is both overbroad and under-inclusive.

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[15] The Court below similarly observed that "R.C. 3513.257 would not bar the staunchest party member who decided on March 19 to change horses and file as an independent, for example, nor would it permit a true independent to run, if he or she filed on March 21." Petr. App. 54.

Accordingly, as the District Court concluded, "unlike the California provisions upheld in *Storer*, which were plainly drafted to effect a comprehensive and nondiscriminatory disaffiliation scheme . . . RC 3513.257 acts as a disaffiliation provision only by mere happenstance, not by any reasonably discernible legislative design." [16] Petr. App. 54.

Finally, even if the filing deadline had been intended to serve political stability ends and did serve such ends in elections for statewide office, it would still be impermissible under the analysis in *Storer*. There, this Court upheld California's one-year disaffiliation requirement as applied to independent candidates, on the grounds that it was necessary to serve California's compelling state interest in assuring the integrity of the party primary process. But the circumstances here are entirely different from those upheld in *Storer*. The foundation for the Court's upholding the disaffiliation provision in California was that (1) disaffiliation provisions applied across the board to all candidates, partisan or independent, for the same office, and (2) the party primary was, in California, the integral first step in a two-step process for choosing state officers. Neither of these conditions is present here.

Plaintiffs challenging the disaffiliation provision in *Storer* were two Congressional candidates denied ballot access under California's disaffiliation provision because of prior party membership. As this Court emphasized,

> "The requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot. It involves no discrimination against independents. Indeed, the independent candidate must be clear of political party affiliations

[16] Moreover, insofar as the State is seeking to promote efforts at intra-party compromise, an early filing deadline is plainly counterproductive, penalizing those who, like respondent Anderson, initially seek to pursue their goals and positions within a political party.

> for a year before the primary; the party candidate must not have been registered with another party for a year before he files his declaration, which must be done not less than 83 and not more than 113 days prior to the primary."

415 U.S. at 733-34.

Here, by contrast, the Ohio filing deadline is inapplicable to partisan nominees for President. It prevents only independents, and not partisan candidates, from making late ballot decisions.[17] Thus, unlike the statute in *Storer*, Ohio's deadline is discriminatory and is not a neutral provision expressive of a general state policy, falling equally on partisan as well as independent candidates.

Second, and equally important, the *Storer* Court upheld the disaffiliation provision notwithstanding its substantial burden on candidate and voter rights because of what it concluded was the State's clear, compelling and "general" policy of requiring the resolution of intra-party disputes through the primary. As the Court wrote,

> The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire selection process . . . by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates. The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences.

415 U.S. at 735.

Again, the contrast to the role of the primary in the Presidential selection process is marked. Unlike a pri-

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[17] Under Ohio law, for example, a Presidential candidate who participates in a major party primary may nonetheless "jump" the party and appear on the November general election ballot as the candidate of a *minor* party, provided his name is certified to the Secretary of State within 75 days of the general election. Ohio Rev'd Code § 3505.10.

mary for state-wide office—at which the winners of the primary are the candidates who will appear on the ballot —the winner of a party primary for President has no guaranty of being that party's ultimate nominee.[18] The function of the presidential preference primaries, in those states that have them, is as a "warm-up," not for the general election, but for a party convention at which delegates—some bound to vote for the winner of a preference primary or caucus, others not—gather together in the summer to select the party nominee. In view of the small role of any one primary in selecting party presidential nominees, the state's interest in requiring independent candidates to make an "early choice" between the primary and independent route takes on an entirely different, and diminished, meaning in the Presidential context.[19] As the Court below stated:

> [T]he defendant has not been persuasive that the compelling state interest which the Supreme Court found in the context of a statewide election in Part I of *Storer* is equally compelling in an election for the national office of President. . . . When the defendant argues that the burden placed on Congressman Anderson by R.C. 3513.257 is minimal compared to the one-year disaffiliation requirement exacted by California, he strains to force a national peg into a state hole.

Petr. App. 55.

As the District Court found, however, the filing deadline was not in fact intended to and does not serve the asserted interests in political stability. The issue of what the

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[18] Ohio, like every other state, recognizes the need to accomodate this process, which may even yield dark-horse convention nominees; a party nominee in Ohio will thus appear on the ballot regardless of his participation or success in the state primary.

[19] Indeed, California does not even apply its disaffiliation provision, upheld in *Storer*, to Presidential candidates or electors, in recognition of the entirely diminished role of the state primary in the selection of presidential nominees; nor is any other state to our knowledge seeking to bar Congressman Anderson from the general election ballot on grounds of a disaffiliation provision.

State of Ohio *could* do under *Storer's* rationale to promote the stability of its political system in the Presidential context is thus entirely academic.

V. The Summary Affirmance in *Sweetenham* v. *Rhodes* Does Not Control Disposition of this Case.

Petitioner's claim that this case is governed by the Supreme Court's summary affirmance of *Socialist Labor Party* (*Sweetenham*) v. *Rhodes*, 318 F.Supp. 1262 (S.D. Ohio 1970), *aff'd sub. nom. Sweetenham* v. *Gilligan*, 409 U.S. 942 (1972), ignores settled principles as to the reach of a summary affirmance. *See, e.g., Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975); *Illinois State Board of Elections* v. *Socialist Workers Party, supra*, 440 U.S. at 180-83. Indeed, this Court has warned of an over-expansive reading of its summary actions: "The precedential significance of the summary action . . . is to be assessed in the light of all of the *facts* in that case. . . ." *Mandel* v. *Bradley, supra*, 432 U.S. at 177 (emphasis added). Thus, "[t]he precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions,'" *Illinois State Board of Elections* v. *Socialist Workers Party, supra*, 440 U.S. at 182, quoting *Mandel* v. *Bradley, supra*, 432 U.S. at 176.

The precedential effect of *Socialist Labor Party* v. *Rhodes, supra*, must therefore be determined by reference to its facts. Plaintiffs, independent candidates for Congress, challenged then-existing provisions of Ohio law requiring them to file their nominating petitions 90 days prior to the May 1970 primary election. Plaintiffs had taken *no* steps to become candidates before that election; indeed, the first date by which such plaintiffs reported any progress toward complying with the nominating procedures was at the end of June, almost two months after the primary. The three-judge court, without ruling on the validity of the filing deadline itself, concluded that plaintiffs "who did not officially declare their candidacy *at or before* the time Ohio requires politi-

cal parties to choose their nominees are not entitled to ballot position." *Id.* (Emphasis added.) Here, by contrast, respondent Anderson declared his candidacy almost seven weeks before the Ohio primary, and tendered all his nominating papers on May 16, over three weeks prior to the primary and months before the party Presidential candidates are chosen.

Petitioner's assertion that the specific challenge presented in the jurisdictional statement and ruled on by this Court should be determined solely by reference to the "questions" framed by the parties, without regard to the facts in the case, is plainly incorrect. *Mandel* v. *Bradley*, *supra*, 432 U.S. at 177. The only question "necessarily decided" by the three-judge court in *Sweetenham* was that plaintiffs, who had not taken steps to become candidates prior to the time when partisan candidates were selected, 318 F. Supp. at 1273, were not entitled to relief. Because the plaintiffs tendered no nominating petitions prior to the primary, the district court never reviewed or ruled on the validity of the Ohio filing date; it held only that a state may require that candidates qualify for ballot position "at a designated time prior to an election." For this reason alone, the summary affirmance in *Sweetenham* plainly is not dispositive here.

Moreover, it is clear that the issue of discrimination between independent and partisan Presidential candidates was not and could not have been at issue in *Sweetenham*. Plaintiffs there were contenders for statewide office, whose partisan rivals were in fact chosen at the primary election. Thus, in *Sweetenham* the filing deadline was in fact identical for all partisan and independent candidates, whereas partisan Presidential candidates need not be designated for Ohio's general election ballot until the end of August—five months after the filing deadline for independents. In *Illinois State Board of Elections* v. *Socialist Worker Party*, *supra*, despite a prior summary affirmance of a decision upholding the same 5% signature requirement for independent

mayoral candidates there at issue, this Court concluded that because a different equal protection challenge was involved in the later suit the prior summary affirmance was not dispositive. Here, too, the discrimination between independent and partisan Presidential candidates was neither raised or considered in *Sweetenham* and for this reason as well *Sweetenham* does not control.

CONCLUSION

For the foregoing reasons, the petition for certiorari prior to judgment in the Court of Appeals should be denied.

Respectfully submitted,

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September 6, 1980

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 80-0176 P

JOHN B. ANDERSON, STEPHEN P. KELLEY, JAMES D. HARRINGTON, and GERALD M. EISENSTAT,
Plaintiffs

v.

RODNEY S. QUINN, in his official capacity as Secretary of State of the State of Maine,
Defendant

OPINION AND ORDER OF THE COURT

GIGNOUX, J.

Congressman John B. Anderson is an independent candidate for President of the United States in the November 1980 general election. He declared his independent candidacy on April 24, 1980. In this action Anderson and three of his supporters[1] challenge the constitutionality of a Maine statute, 21 Me. Rev. Stat. Ann. § 494(9), which requires an independent candidate for President of the United States to file a nominating petition with the Secretary of State of Maine by April 1, 1980—181 days prior to the date when political parties are required to certify their nominees for Presidential electors to the Secretary of State and 217 days before

[1] Plaintiff Stephen P. Kelley, a registered Maine voter, seeks certification as a candidate to appear on the November 1980 ballot as a Presidential elector for Anderson. Plaintiff James D. Harrington, a registered Maine voter, desires to cast his vote in the November 1980 election for the electors pledged to Anderson. Plaintiff Gerald M. Eisenstat, a registered New Jersey voter, intends to cast his vote in the November 1980 general election for the electors pledged to Anderson in New Jersey.

the November 4, 1980 general election.[2] The statutory filing deadline prevents the placement of Anderson's name on the November ballot as an independent candidate for President. Anderson and his supporters charge that, as a result, the filing deadline impermissibly burdens their constitutional rights to associate for the advancement and expression of political beliefs and effectively to exercise their franchise for the Presidential candidate of their choice, as guaranteed by the First and Fourteenth Amendments, and invidiously discriminates against plaintiffs and others similarly situated, denying them the equal protection of the laws secured by the Fourteenth Amendment.[3] Plaintiffs seek a declaratory judgment that 21 Me. Rev. Stat. Ann. § 494 (9) is unconstitutional, null and void as applied to independent candidates for President, or alternatively as applied to the independent candidacy of Congressman Anderson. Plaintiffs also seek a permanent injunction enjoining the defendant Secretary of State of Maine[4] from enforcing the filing deadline against Anderson, and a reasonable attorney's fee pursuant to 42 U.S.C. § 1988. Jurisdiction is properly asserted under 28 U.S.C. §§ 1331, 1343(3) and 2201, and 42 U.S.C. § 1983.

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[2] Anderson and his supporters have successfully challenged the constitutionality of state statutory filing deadlines in at least three other federal courts. *See* Anderson v. Hooper, No. 80-432-M Civil (D. N.M. July 8, 1980) (preliminary injunction); Anderson v. Celebrezze, No. C-2-80-400 (S.D. Ohio July 21, 1980) (final judgment); Anderson v. Morris, Civ. No. Y-80-1632 (D. Md. August 6, 1980) (final judgment).

[3] Plaintiffs also contend that the early filing deadline violates the Supremacy Clause, U.S. Const. art. VI, and should be struck down as the result of a "malfunction of the legislative process." The Court finds it unnecessary to reach these additional arguments.

[4] Defendant Rodney S. Quinn, Secretary of State of the State of Maine, is charged with administering the relevant sections of the Maine election law.

The matter is before the Court on plaintiffs' motion for summary judgment and a stipulation of facts. The legal issues have been comprehensively briefed and argued.

For the reasons to be stated, plaintiffs' motion for summary judgment is granted.

I

The significant facts may be briefly summarized. Until April 24, 1980 Congressman Anderson was an active candidate for nomination by the Republican party for President of the United States. On April 24, 1980, he announced his independent candidacy for President. Subsequent to that date his supporters gathered the number of signatures of registered Maine voters required by Maine law for nominating petitions to place Anderson's name on the general election ballot in November and submitted them to municipal registrars for certification by 5:00 p.m., June 5, 1980, as required by 21 Me. Rev. Stat. Ann. § 494(8). On June 9, the first working day after the last of the certified petitions were received from the municipal registrars, the nominating petitions, containing approximately 6,000 certified signatures, were tendered to the office of the Secretary of State, together with the consent forms required by 21 Me. Rev. Stat. Ann. § 495. The state officials rejected the petitions and consent forms on the sole ground that they were not timely filed under 21 Me. Rev. Stat. Ann. § 494(9). Pursuant to an agreement between the parties, while rejecting the petitions as untimely, the state officials accepted custody of them and have processed them in accordance with the usual procedures. The Secretary of State has determined that, apart from their noncompliance with the April 1 filing deadline, the nominating petitions and consent forms comply with the requirements of Maine law and contain a sufficient number of signatures to qualify Anderson for placement on the

general election ballot in November. The parties agree that Anderson would have been certified as an independent candidate for President and placed on the general election ballot, but for the April 1 filing deadline prescribed by 21 Me. Rev. Stat. Ann. § 494(9).

II

The Supreme Court has firmly established that "[r]estrictions on access to the ballot burden two distinct and fundamental rights, 'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.' " *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979) (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968)). The Court has also repeatedly held that substantial burdens on these rights are invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest. *Illinois State Board of Elections* v. *Socialist Workers Party, supra; American Party of Texas* v. *White*, 415 U.S. 767, 780-81 (1974); *Storer* v. *Brown*, 415 U.S. 724, 729 (1974); *Williams* v. *Rhodes, supra* at 31. And, in its most recent ballot access decision, the Supreme Court emphasized that " 'even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty,' *Kusper* v. *Pontikes*, 414 U.S. 51, 58-59 (1973), and we have required that States adopt the least drastic means to achieve their ends." *Illinois State Board of Elections* v. *Socialist Workers Party, supra* at 185.

The restriction on an independent Presidential candidate's access to the ballot imposed by Maine's April 1 filing deadline substantially burdens the associational and franchise rights of independent candidates and their supporters, and also effects an invidious discrimination. An independent candidate must decide to run as an

independent, gather sufficient certified signatures, and file with the Secretary of State by April 1. In practice, the deadline bars an otherwise viable independent candidate from the Maine general election ballot solely because he decides to run after April 1. Maine imposes no similar burden on party candidates for the Presidency. Maine does not require party candidates for President to qualify or declare their candidacies by any particular date, and permits the names of party Presidential electors to be certified to the Secretary of State as late as September 30.[5] Clearly, then, Maine's April 1 filing deadline as applied to independent candidates for the President places a substantial and unequal burden on them.

Only a compelling state interest can justify the substantial and unequal burden imposed by Maine's April 1 filing deadline upon independent candidates for President.[6] Yet the State has failed to show any compelling

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[5] The Maine election laws require that the names of Presidential electors nominated by a political party be certified to the Secretary of State within 60 days after the state convention, 21 Me. Rev. Stat. Ann. § 402(2), which must be held between March 1 and August 1 of the election year. *Id.* § 401. Political parties are not required to certify their Presidential and Vice Presidential candidates to the Secretary of State by any particular date.

[6] The State argues that the traditional "compelling state interest" analysis in ballot access cases has been superseded by the "reasonably diligent candidate" standard set forth by the Supreme Court in Storer v. Brown, *supra*, and Mandel v. Bradley, 432 U.S. 173 (1977) (per curiam). In *Storer* and *Mandel*, plaintiffs had tried and filed to obtain the required number of signatures on nominating petitions by the filing deadline. The Supreme Court remanded both cases for further factual development in the lower courts, with instructions to determine whether, in the context of the particular State's politics, "a reasonably diligent independent candidate" could be expected to satisfy the ballot access requirement. Storer v. Brown, *supra* at 742; Mandel v. Bradley, *supra* at 177-78. The standard enunciated in *Storer* and *Mandel* plainly has no application to this case. What the lower courts were called upon to determine

interest, or even a rational justification, for the April 1 filing deadline. The State does not contend that Congressman Anderson has failed to satisfy the State's interest in keeping a frivolous candidate off the ballot by assuring that he is a serious candidate with a significant level of support, the state interest the Supreme Court has most frequently recognized as justifying ballot access restrictions. *See, e.g., Illinois State Board of Elections* v. *Socialist Workers Party, supra* at 184-85; *American Party of Texas* v. *White, supra* at 782 n.14; *Lubin* v. *Panish*, 415 U.S. 709, 715 (1974); *Jenness* v. *Fortson, supra* note 6, at 442. Nor does the State assert that an April 1 filing deadline is required to provide adequate time to verify petitions and print ballots, another state interest which has been recognized by the courts. *See, e.g., Salera* v. *Tucker*, 399 F. Supp. 1258, 1267 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976). Rather, Maine maintains that two other state interests are served by the restriction imposed by the April 1 filing deadline.

First, the State claims that the filing deadline advances "the State's interest in treating all candidates within the State's practical power to regulate equally." The State's assertion is that it cannot regulate the man-

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in those cases was whether the State's method for assuring that a candidate had a "significant modicum of support," Jenness v. Fortson, 404 U.S. 431, 442 (1971), was unduly burdensome. In the present case, there is no dispute that Congressman Anderson has sufficient community support to merit placement on the ballot. Nor do plaintiffs claim that the nominating procedures themselves are unduly burdensome. The only issue is whether the State can require an independent candidate for President to begin to pursue his candidacy in Maine before April 1 and require no equivalent effort by the nominees for President of political parties. Moreover, any doubt as to the continued viability of the "compelling state interest" test where petition filing requirements are challenged has been dispelled by the Supreme Court's most recent ballot access decision, Illinois State Board of Elections v. Socialist Workers Party, *supra* at 184.

ner in which party Presidential candidates are selected because of the Supreme Court's decision in *Cousins* v. *Wigoda*, 419 U.S. 477 (1975), and that therefore the filing deadline can be justified because it treats equally all candidates within the State's power to regulate. This argument borders on the frivolous. Plainly, the burdens imposed on independent Presidential candidates must be compared with those imposed on other candidates for the same office, not with candidates for other offices who are elected through an entirely different process.[7]

The second interest asserted by the State is "the State's . . . interest [in] the protection of the integrity of the independent route to the ballot." The State's position is that it has a valid interest in assuring that independent candidates are indeed independent, and therefore in preventing an unsuccessful party candidate from pursuing a second route to the general election ballot. *See Storer* v. *Brown*, *supra* at 733. In effect, the State argues that the April 1 filing deadline acts as a disaffiliation requirement to prevent persons who, having failed to obtain a party nomination, then seek to run as independents. *See id.* at 733-36. *See also Kusper* v. *Pontikes*, *supra* at 59-61; *Rosario* v. *Rockefeller*, 410 U.S. 752, 760-62 (1973). The short answer to this contention is that the filing deadline plainly was not in-

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[7] Party candidates for statewide elective offices in Maine secure a place on the general election ballot by winning a party primary. To qualify for the primary, they must file nominating petitions by April 1. By a 1979 amendment to the Maine election laws, ch. 359, 1979 Maine Acts 443, the Maine legislature required independent candidates to file by the same date "to Make Equal Application of Legal Requirements for Independents, Democrats and Republicans in all Respects." *Id.* The effect was to establish the same filing date for nominating petitions both for candidates in the primaries, *see* 21 Me. Rev. Stat. Ann. §§ 444 & 445(8) and for independent candidates. *Id.* § 494(9). There is no primary election in Maine for candidates for President, Vice President or Presidential elector.

tended to serve as a disaffiliation requirement,[8] and it does not serve that purpose in practice. The legislative purpose of Section 494(9), as conceded by the State, was to establish a filing deadline for independent candidates identical to that for party candidates running in primaries. Legis. Doc. 1136, 109th Legis., 1st Sess. (1979) (Statement of Fact). Concerns over the disaffiliation of independent candidates were addressed by the Legislature in entirely different statutory provisions, 21 Me. Rev. Stat. Ann. §§ 135(2) & 493; they had nothing to do with the imposition of the deadline. Although enacted by the same Act, ch. 359, 1979 Me. Acts 443, there is no indication in the legislative history that Section 494(9) and the disaffiliation provisions were not separate measures with distinct purposes. *See* Legis. Doc. 1136, *supra*; 1979 Me. Legis. Rec. 1024, 1111. Moreover, the deadline is wholly ineffective as a disaffiliation provision. On its face, it does not prohibit candidates affiliated with a political party, like Anderson, from running as independents as long as they meet the deadline. And it does prohibit genuinely unaffiliated candidates from running as independents if they fail to meet the deadline.

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[8] Indeed, the record suggests that the Maine legislature did not intend to impose any disaffiliation requirement on independent candidates for President and Vice President. The sole reason for imposing the disaffiliation requirement on independent candidates mentioned in the legislative history was to create a restriction equivalent to that imposed on candidates in party primaries, who are required by 21 Me. Rev. Stat. Ann. § 134(3) to be affiliated with the party in whose primary they are running. *See* 1979 Me. Legis. Rec. 1024 (Remarks of Rep. Tarbell). There is no equivalent requirement imposed on party candidates for the Presidency and Vice Presidency. Furthermore, the Maine Attorney General's office has determined that 21 Me. Rev. Stat. Ann. § 493, the disaffiliation statute for independents, does not apply to candidates for President and Vice President, although the reasons for that interpretation do not appear in the record.

Since the April 1 filing deadline imposed upon independent candidates for President effects substantial and unequal burdens on plaintiffs' rights of association and franchise and is not justified by any compelling state interest, the Court holds 21 Me. Rev. Stat. Ann. § 494 (9) unconstitutional as applied to the independent candidacy of Congressman John B. Anderson for President of the United States.

III

In accordance with the foregoing, plaintiffs' motion for summary judgment is granted, and judgment will be entered:

(1) Declaring the deadline for filing nomination petitions and consent forms on behalf of independent candidates prescribed in 21 Me. Rev. Stat. Ann. § 494 (9) is unconstitutional, null and void as applied to the independent candidacy of plaintiffs John B. Anderson for President of the United States; and

(2) Permanently enjoining defendant Rodney S. Quinn, his agents, servants, employees, subordinates, and all other persons acting in concert with him, from enforcing or applying the filing deadline set forth in 21 Me. Rev. Stat. Ann. § 494(9) as a ground for failing or refusing to certify the names of plaintiff Anderson and his running mate for Vice President for inclusion on the official Maine general election ballot as independent candidates for President and Vice President in the general election to be held on November 4, 1980.

IT IS SO ORDERED.

Dated at Portland, Maine, this 11th day of August 1980.

/s/ Edward G. Gignoux
United States District Judge

A TRUE COPY

ATTEST:

William S. Brownell
Clerk

By /s/ Patricia Puschock
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 80-0176 P

JOHN B. ANDERSON, STEPHEN P. KELLEY, JAMES D. HARRINGTON, and GERALD M. EISENSTAT,
Plaintiffs

v.

RODNEY S. QUINN, in his official capacity as Secretary of State of the State of Maine,
Defendant

DECLARATORY JUDGMENT AND INJUNCTION

Consistent with the Opinion and Order of this Court dated August 11, 1980, it is hereby

ORDERED, ADJUDGED and DECREED that:

1. The deadline for filing nomination petitions and consent forms on behalf of independent candidates prescribed in 21 Me. Rev. Stat. Ann. 494(9) is unconstitutional, null and void as applied to the independent candidacy of plaintiff John B. Anderson for President of the United States; and

2. The defendant Rodney S. Quinn, Secretary of the State of Maine, his agents, servants, employees, subordinates, and all other persons acting in concert with him are permanently enjoined from enforcing or applying the filing deadline set forth in 21 Me. Rev. Stat. Ann. § 494(9) as a ground for failing or refusing to certify the names of plaintiff John B. Anderson and his running mate for Vice President for inclusion on the official Maine general election ballot as independent candidates for President and Vice President in the general election to be held on November 4, 1980.

Dated at Portland, Maine, this 11th day of August 1980.

/s/ Edward G. Gignoux
United States District Judge

A TRUE COPY

ATTEST:

William S. Brownell
Clerk

By /s/ Patricia Puschock
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. Y-80-1632

JOHN B. ANDERSON; D. A. BERT BOOTH;
KEVIN P. MCCLEAF; GERALD M. EISENSTAT

v.

WILLARD A. MORRIS, State Administrator of the Election Laws; THEODORE N. CLARK, Chairman of the State Administrative Board of Election Laws; JAMES W. JOHNSON, Vice-Chairman of the State Administrative Board of Election Laws; REGINALD A. ASPLEN, Member of State Administrative Board of Election Laws; KAREN LANCASTER, Member of the State Administrative Board of Election Laws; SYLVIA RAPHAEL, Member of the State Administrative Board of Election Laws; STATE ADMINISTRATIVE BOARD OF ELECTION LAWS

Filed: August 6, 1980

Henry R. Lord, Esquire, Michael C. Powell, Esquire and Thomas J. Gisriel, Esquire, Baltimore, Maryland, and Mitchell Rogovin, Esquire, George T. Frampton, Jr., Esquire, and Ellen M. Semonoff, Esquire, Washington, D.C. for Plaintiffs.

Stephen H. Sachs, Esquire, Attorney General, George A. Nilson, Esquire, Assistant Attorney General, Diana G. Motz, Esquire, Assistant Attorney General and Robert A. Zarnoch, Esquire, Assistant Attorney General for Defendants.

YOUNG, United States District Judge

John B. Anderson, Independent candidate for President of the United States, has filed suit against Maryland

election officials challenging the constitutionality of state laws which prevent him from being on the general election ballot. Joining him as plaintiffs are D. A. Bert Booth, a registered voter in Maryland who wishes to vote for Anderson, Kevin P. McCleaf, a Maryland registered voter and elector pledged to Anderson, and Gerald M. Eisenstat, a registered voter in the State of New Jersey who intends to vote for Anderson. Cross motions for summary judgment have been filed based on a joint stipulation of facts submitted by the parties. For reasons stated below, judgment will be entered for the plaintiffs. Because the Court finds the burdens on plaintiff Anderson's rights to be an adequate basis for its decision, no separate consideration has been given to the claims by the other plaintiffs.

I. THE FACTS

On June 8, 1979, plaintiff Anderson declared his candidacy for the Republican Party nomination for President. By letter of March 4, 1980, Maryland Secretary of State Fred L. Wineland notified the plaintiff that, pursuant to Ann. Code of Maryland, Article 33, § 12-2(a)(1), Anderson's name would be placed on the Republican primary ballot in Maryland unless prior to March 21 the plaintiff filed an affidavit stating he was not a candidate for the nomination.[1]

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[1] Article 33, § 12-2(a)(1) provides as follows:

(a) *Manner of becoming candidate for nomination for President; procedure for casting votes as uncommitted; withdrawal of candidacy.*—Whenever a party uses a primary election to nominate a candidate for President of the United States, any person who desires to run in the primary election may become a candidate for nomination only:

(1) By direction of the Secretary of State who shall place the name of the candidate upon the ballot no sooner than 70 days for later than 53 days preceding the date set by law for the primary election when he has determined in his sole discretion that the

On April 24, 1980, the plaintiff publicly announced that he would pursue his candidacy for the presidency as an Independent. At the same time, he renounced his previously declared intention to seek the Republican Party's nomination for that office, although stating that he would remain a member of the Republican Party. He also notified Maryland Secretary of State Wineland of his withdrawal. On April 28, Secretary of State Wineland informed Anderson that his name would remain on the ballot, because the plaintiff had not withdrawn from the race before the deadline specified by law (March 21). Article 33, § 12-2(a)(4).

Following Anderson's announcement, a group of his supporters in Maryland began efforts to secure the necessary signatures of registered voters to place his name on the general election ballot as an Independent candidate for President. Between May 19 and July 7, 1980, Anderson supporters gathered approximately 89,019 signatures of persons purporting to be Maryland registered voters and submitted them to local boards on July 8, 1980. Under Maryland law, 55,517 valid signatures must be submitted (three percent of all registered voters in the state); one third must be submitted by March 3, 1980, while the remainder are due August 4.[2] Article 33, § 7-1.

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candidate's candidacy is generally advocated or recognized in the news media throughout the United States or in Maryland, in accordance with the national party rules, unless the candidate executes and files with the Secretary of State an affidavit stating without qualification that he is not and does not intend to become a candidate for the office in the Maryland primary election;

* * * *

[2] The first deadline is determined from the date of the primary election (seventy days before), Article 33 §§ 7-1(c)(1) and 4A-3, while the latter date is set as the first Monday in August. Article 33, § 7-1(c)(2). Thus, in a non-presidential election year, when the primary is held in September, the first deadline would be considerably closer to the general election.

Maryland law also requires than an Independent's certificate of candidacy be filed by March 3—the date most candidates for primary elections must file.[3] Article 33, § 4A-3.

The defendants, who are responsible for administering Maryland's election laws, will not place plaintiff Anderson's name on the general election ballot on the grounds that a certificate of candidacy and a sufficient number of signatures were not filed timely by the March 3 deadline, as required by Article 33, § 7-1. It is conceded, however, that Anderson is qualified as a person who "may be nominated by petition" pursuant to Article 33, § 7-1(a). It is further conceded that the so-called "sore loser" provision, which keeps primary election losers off the general election ballot, does not apply to presidential elections.[4]

The stipulated facts relating to the standing of candidate Anderson in the national political polls and relating to his campaign efforts make it clear that the plaintiff is a non-frivolous candidate for the presidency with a chance of influencing the outcome of the election.

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[3] As indicated earlier, presidential candidates who are determined by the Secretary of State to be generally recognized as such in the media appear on the ballot without any action on their part. Instead, they are notified that they will appear on the ballot unless they file an affidavit by a set deadline stating that they are not candidates. Article 33, § 12-2(a), *supra*, note 1.

[4] Article 33, § 8-2(a) provides:

§ 8-2. NAME OF DEFEATED PRIMARY CANDIDATE NOT TO BE PRINTED ON GENERAL ELECTION BALLOT.

(a) No person who has been defeated for the nomination for any office in a primary election, except a candidate for the office of judge, and except as provided in subsection (b) below, shall have his name printed on the ballot at the succeeding general election as a candidate for any office. Nothing in this subsection shall be interpreted as being applicable to candidates for nomination of their party for President of the United States who have been defeated in a Presidential preference primary election.

The plaintiff's motion for summary judgment argues both that Maryland's requirements discriminate unconstitutionally against independent candidates, and that freedom of association is restricted unconstitutionally.

Federal courts in other states have struck down early filing deadlines upon challenges by plaintiff Anderson. In *Anderson* v. *Celebrezze*, No. C-2-80-400 (S.D. Ohio, July 21, 1980), the court found that a March 20 deadline affected fundamental rights and was not justified by any compelling state interest. Likewise, the court in *Anderson* v. *Hooper*, No. 80-432-M Civil (D.N.M., July 8, 1980), found that a March 4 deadline discriminated against Independent candidates. Both states had "sore loser" statutes, but, for different reasons, the statutes did not apply to Anderson under the circumstances.

II. BASIC EQUAL PROTECTION ANALYSIS

It has been held that the right to associate for political beliefs, and the right to cast one's vote effectively "rank among our most precious freedoms." *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968). It is clear that such rights are at stake in this case, since Maryland law prevents a candidate from appearing on the ballot, and prevents voters from effectively voting for that candidate.[5] It is also clear that Maryland treats Independents differently than it treats party candidates with respect to these rights. State law requires petitions with the requisite number of signatures for an Independent candidacy, while no petitions are required for a party nominee.

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[5] While the plaintiff could mount a write-in campaign, Article 33, §§ 4D-1 and 16-3(b)(3), it has been observed that "the realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot." *Lubin* v. *Panish*, 415 U.S. 709, 719 n.5 (1974); *see also Williams* v. *Rhodes*, *supra*, at 437 (Douglas J., concurring).

Article 33, § 7-1. The law discriminates further with respect to presidential candidates in that an Independent seeking to be placed on Maryland's general election ballot must file his certificate of candidacy in early March, Article 33, §§ 7-1 and 4A-3, although in theory a party nominee could be placed on the ballot without having been a candidate at that time. Maryland law does not require the State Administrative Board of Election Laws to certify party nominees to the local boards until late August. Article 33, § 8-4. "Based upon past experiences, the names of the Democratic and Republican nominees are generally transmitted to the State Board a week after the respective National Conventions." Stipulation 40. Thus, a party candidate might not have to join the race until his party's convention, less than three months from the general election, while an Independent must do so eight months ahead. The defendants argue strongly that in the current primary system, as a practical matter, a party candidate must join the race at least a year in advance. While this has certainly been the general practice, it is not required by Maryland law, and it is the requirements of Maryland law which are before the Court at the present.

It has been stated by the Supreme Court that:

> In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

Williams v. *Rhodes*, *supra*, at 31. Furthermore, even where there is a compelling state interest involved, it has been required "that States adopt the least drastic

means to achieve their ends." *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U.S. 173, 185 (1979). Accordingly, the Court will apply a two-part analysis to the restrictions involved here: First, is there a compelling state interest which justifies that kind of restriction? Second, is the restriction the least drastic means available to achieve that interest?

The defendants here, as the defendants in the Ohio case, argue that *Storer* v. *Brown*, 415 U.S. 724 (1974), and *Mandel* v. *Bradley*, 432 U.S. 173 (1977), have changed the law on equal protection analysis. The Court recognizes that language in both cases, taken out of context, creates some confusion. The Supreme Court in *Storer* made the following comments which might be interpreted as requiring a balancing test as the first step of the analysis:

> . . . the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree," *Dunn* v. *Blumstein*, *supra*, at 348, very much a matter of "consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams* v. *Rhodes*, *supra*, at 30; *Dunn* v. *Blumstein*, *supra*, at 335. What the result of this process will be in any specific case may be very difficult to predict with great assurance.

Storer v. *Brown*, *supra*, at 730. In remanding a case for further proceedings in *Mandel*, the Supreme Court

instructed the lower court to make the following inquiry, citing *Storer* as the source of the standard:

> [I]n the context of [Maryland] politics, could a reasonably diligent independent candidate be expected to satisfy the [ballot access] requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not. We note here that the State mentions only one instance of an independent candidate's qualifying . . . but disclaims having made any comprehensive survey of the official records that would perhaps reveal the truth of the matter.

Mandel v. *Bradley*, *supra*, at 177-178.

It is argued that these cases require as an initial inquiry by this Court a determination of whether a "reasonably diligent independent candidate" could satisfy the Maryland requirements. The Court rejects this contention. While the extent of the burden must be balanced against the state interest involved at a later point in the analysis, this is not the initial inquiry. Having determined that fundamental rights are being burdened, the first question is whether there is a compelling state interest which might justify these burdens. In other words, *Storer* and *Mandel* do not relieve the state of the burden of showing some compelling state interest which may justify the restrictions. Only after the Court is satisfied that such a compelling interest exists will it reach the issue of how drastic the restrictions are—that is, could a reasonably diligent candidate comply? To accept the defendants' argument would allow completely arbitrary restrictions on fundamental rights simply because the initial inquiry showed that a

"reasonably diligent candidate" could comply. That is clearly not the result intended by the Supreme Court. *See Anderson* v. *Celebrezze*, No. C-2-80-400 (S.D. Ohio, July 21, 1980) at 14-18.

III. EQUAL PROTECTION ANALYSIS APPLIED

Three compelling state interests have been suggested by the defendants, and by courts in other cases, which might justify the restrictions placed on Independent candidates seeking a place on the general election ballot in Maryland: 1) The interest in keeping frivolous candidates off the ballot. 2) the administrative interest in adequate time to verify petitions and print ballots. 3) The interest in the stability of the party system.

The interest of the state in keeping frivolous candidates off the ballot to keep the ballot to a manageable size has been recognized by the Supreme Court. *Lubin* v. *Panish*, 415 U.S. 709 (1974). The Court pointed out that procedures designed to further this interest may aid, rather than hinder effective voter choice:

> A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process.

Id. at 715. The Supreme Court suggested as one possible method of keeping frivolous candidates off the ballot "the precondition of demonstrating some reasonable quantum of voter support by requiring such parties [or candidates] to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election." *Id.* at 718. Thus it is clear that there is a compelling state interest which justifies some sort of petition re-

quirement. In this case, the plaintiffs challenge neither the existence of the requirement, nor the number of signatures required.[6]

The administrative interest ("the need for sufficient time to resolve any challenges to the nomination papers and to prepare ballots in a deliberate and orderly fashion") has also been recognized by the courts. *Salera* v. *Tucker*, 399 F. Supp. 1258, 1267 (E. D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976); *see also Anderson* v. *Celebrezze*, *supra*, at 18-19. This interest is not at issue, however. The plaintiffs do not challenge the legitimacy of this interest. While this interest does justify some filing deadline, it could not justify the March 3 deadline for Independent candidates. The printing of ballots could not begin until late August in any case, since the Democratic nominee will not be known before then.[7] Nor does verification of signatures on the petitions require that much time. In fact, Maryland law requires that local boards deliver the verified petitions to the State Administrative Board of Election Laws by twenty-one days after the deadline. Article 33, § 7-1(j). Even if it required the full twenty-one days to verify the two-thirds of the signatures due on the final deadline, there would be justification at best for a preliminary deadline for the first third approximately ten or eleven days earlier. In addition to verification by the local boards, there is the requirement that the state board tally the signatures to determine whether a sufficient number were filed.

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[6] A challenge to the number of signatures required would have little merit, since Maryland law requires 3% of the registered voters, while a requirement of 5% of the total votes cast in the last general election has been upheld. *Storer* v. *Brown*, *supra*, at 738-740.

[7] In a non-presidential election year, the printing could not begin until even later, since the primary election is in September in such years. Article 33, § 5-2.

Article 33, § 7-1(k). This process generally takes no more than five days. Stipulation 36(G). Thus it is clear that administrative concerns alone would not justify a deadline any earlier than this year's final deadline of August 4 (although the Court does *not* decide whether administrative needs justify a deadline even that early). Accordingly, unless there is some other state interest justifying the early deadline, Anderson must be allowed to appear on the general election ballot in Maryland, if the petitions submitted before August 4 otherwise meet state law requirements.

The other interest advanced by the state is its interest in the stability of the party system. This interest is related to the interest in keeping frivolous candidates off of the general election ballot, in that the party system is one way to narrow the field of candidates. The Supreme Court recognized the legitimacy of this interest in *Storer* v. *Brown*, *supra*, at 735, where one of the California provisions upheld by the Court was a requirement that an Independent candidate not be affiliated with a political party within the twelve months preceding the filing of his candidacy. This disaffiliation provision had the effect of a "sore loser" provision in that a defeated primary candidate would obviously not be eligible to run as an Independent; in many respects, the California provision was more restrictive than the typical "sore loser" statute, since it required such an early declaration of Independent status. In upholding the law, the Court commented:

> The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the

> losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.

Id. While this language was in reference to a disaffiliation provision, it would also appear to support the narrower "sore loser" provision employed by some states.

Maryland has neither a pure disaffiliation statute, nor a pure "sore loser" provision which would apply here. The March 3 deadline for Independents has the effect of a "sore loser" provision, however, in that any candidate, such as plaintiff Anderson, who goes into the primary campaign to seek his party's nomination, will be ineligible to run as an Independent by virtue of missing the deadline. The defendants argue that the Constitution does not require that they employ either the typical disaffiliation provision or the typical "sore loser" provision in furthering the state interest in a stable party system. While this statement of the law may be accurate, it adds little to the defendants' argument since they justify the state statutes involved because they have the effect of a "sore loser" provision. Specifically, the defendants argue that Article 33, §§ 4A-3 and 7-1(b)(1), "prevent a defeated Presidential candidate for party nomination, like Plaintiff Anderson, from disavowing his party candidacy when it falters, disrupting the political process and causing strife within his party by attempting another candidacy as an 'independent.'" Defendants' Brief at 46. This is exactly the effect of a "sore loser" provision; notwithstanding their disclaimers, the defendants are in essence asking the Court to uphold the Maryland laws because they have that effect.

The Court declines to do so. It would be a different case if Maryland had a "sore loser" provision which

explicitly applied to Presidential primary losers seeking to run as Independents.[8] It does not. In fact, the state's "sore loser" provision explicitly excludes presidential primaries.[9] Article 33, § 8-2(a). It is only the early deadline which produces this result. The Court is not convinced that a purpose of this deadline was to bring about the same result as a "sore loser" provision. The early deadline has a much broader effect than that. It prohibits *all* Independent candidacies where no certificate was filed by March 3, regardless of the candidate's participation or non-participation in a party primary. Because of this broad coverage, the Court cannot accept the defendants' argument that the statute should be evaluated on the basis that its effect is to keep a defeated primary candidate off of the general election ballot.

In the Ohio case the court rejected the defendants' contention that the effect of the early deadline was the same as a disaffiliation provision, and that the statute should be upheld on that basis. The court found that the law in question "acts as a disaffiliation provision only by mere happenstance, not by any reasonably discernible legislative design." *Anderson* v. *Celebrezze*, *supra*, at 21. This Court also finds that the challenged statute produces the effect relied upon by the defendants only by "happenstance", and not by any "reasonably discernible legislative design."

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[8] The Court does not decide now whether there would or would not be any constitutional problems with such a provision, since that question is not before the Court.

[9] It is not clear from the language of the statute, however, whether the exclusion was intended to address situations such as that of plaintiff Anderson, or whether it was only intended to address the far more common problem of a presidential candidate losing the Maryland primary, but going on to receive his party's nomination. Without removing presidential races from the operation of the "sore loser" law, such a candidate could not appear on the general election ballot in Maryland.

Accordingly, the issue now before the Court is whether the early deadline of March 3 for Independents to file their certificates of candidacy for the presidency is justified by any compelling state interest. The Court limits its consideration to the deadline as it applies to presidential candidates, since there is a clear difference in treatment of Independents and party candidates for president not present elsewhere: although an Independent must file his candidacy by March 3, a party nominee could in theory appear on the general election ballot without having declared his candidacy before the time of the party convention. The Court does not reach the issue of the deadline as it applies in state and local races.

Nor does the Court consider the issue of the number of signatures which must be filed by the early deadline. If the early deadline is unconstitutional, obviously no signatures may be required at that point. If on the other hand the Court were to uphold the deadline, Anderson would be ineligible to run for failure to meet the filing deadline, and there would be no reason to consider the petition requirement. The sole issue to be considered is whether the early deadline itself, as applied to Independents running for president in Maryland, is justified by any compelling state interest. The Court finds it is not.

The defendants suggest that the current law has received implicit approval from the courts because it was drawn up in response to *Mandel* v. *Bradley*, 432 U.S. 173 (1977), *on remand*, *Bradley* v. *Mandel*, 449 F. Supp. 983 (D.Md. 1978). That case arose out of an Independent candidacy for United States Senate in 1976. At that time, Maryland law did not provide for a two-stage submission of petitions, as it does now, but required *all* signatures (three percent of the registered voters) to be submitted by the early deadline (March in presidential primary years). 51,155 signatures were required, but

of the 53,239 which were timely filed by the candidate, only 42,049 were determined to be valid. Bradley filed suit in this Court challenging the early deadline for filing of petitions.

A three-judge court ruled in Bradley's favor. *Bradley* v. *Mandel*, Civ. No. T-76-638 (D.Md., May 17, 1976). In so ruling, the court relied heavily on *Salera* v. *Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976). *Salera* involved a challenge to a Pennsylvania statute requiring that all signatures be gathered in a three-week period ending over two hundred days before the general election. The district court found no state interest sufficiently compelling to justify the early petition filing deadline; the Supreme Court summarily affirmed. The Maryland district court also concluded that the early termination date of the signature gathering period substantially burdened the ability of Bradley to get on the ballot, but did so without any detailed factual inquiry. *Bradley* v. *Maryland*, *supra*, at 7. The court relied on *Salera* for the proposition that the remoteness of the cut-off date alone constituted an impermissible burden on the plaintiff, rejecting the defendants' contention that the district court and the Supreme Court in *Salera* had also considered the shortness of the three-week signature-gathering period.

The Supreme Court remanded the *Bradley* case to the district court for further proceedings, holding that the district court had misinterpreted the summary affirmance in *Salera*. The Court stated that the *Salera* case was distinguishable because of the twenty-one day period, which "enormously increased the difficulty of obtaining the number of signatures necessary to qualify as an independent candidate." *Mandel* v. *Bradley*, *supra*, 432 U.S. at 177. The Maryland district court, on the other hand, had made no finding as to whether there were substantial burdens on an independent candidate trying to

meet the petition deadline. The case was remanded for such a finding, with instructions to determine whether a "reasonably diligent independent candidate" could be expected to meet the deadline. *Id.* at 177.

On remand, the district court determined that the early deadline for filing petitions did in fact constitute an unconstitutional burden. It cited factors such as the adverse winter weather conditions before the deadline, the lack of media coverage at that early stage, and the fact that campaign issues had not developed much by that stage; all of these factors made it difficult for an Independent candidate to gather the necessary signatures so early. *Bradley* v. *Mandel*, *supra*, 449 F. Supp. at 986. The court drew similar conclusions upon examination of past experiences of Independent candidates. *Id.* at 987-988.

Both plaintiffs and defendants misread the *Bradley* opinions. The plaintiffs suggest that the *Bradley* court found the filing deadline itself to be unconstitutional. In fact, the court found that the early deadline for filing the signatures was unconstitutional; the court did not reach the issue of whether the filing deadline *per se* was unconstitutional. The defendants, on the other hand, conclude that the *Bradley* cases stand for the proposition that the filing deadline was not *per se* unconstitutional. They rely heavily on the fact that the Supreme Court remanded the case to determine whether the early petition deadline imposed substantial burdens on a "reasonably diligent independent candidate." The reason the Court did this, however, was that the district court had found that the early petition deadline *did* impose burdens without any detailed factual findings upon which to base the conclusion. The defendants argue that if the deadline itself was *per se* unconstitutional, there would have been no point in remanding. Such is not the case. Neither the district court nor the Supreme Court was faced with

the question of whether the early deadline by itself was unconstitutional. Bradley in fact had *met* the early deadline for filing his certificate of candidacy and therefore had no reason to complain about it. It was the early deadline for filing *petitions* which he complained of, and it is this requirement which the district court found violative of the Constitution. The courts did not reach the issue of the filing deadline itself, and thus, contrary to the assertions of the parties, the *Bradley* cases do not resolve the present dispute.[10]

There are cases which have dealt with the issue of the filing deadline alone. The New Mexico district court, in ruling in Anderson's favor found no compelling state interest which justified a March 4 deadline for Independents, while allowing parties to designate their candidates as late as September 15. *Anderson* v. *Hooper*, *supra*, at 11-13. Similarly, the Ohio district court found that the state had "demonstrated no interest served by the filing deadline other than its simple function as an arbitrary point in time by which independent candidates

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[10] The only language in any opinion which supports the contention by the defendants that the district court suggested and endorsed the current two-stage filing process is found in the original opinion before remand. There, the court in rejecting the state's argument that the early filing deadline for petitions and primary candidates treated all equally, stated that "quite readily, Maryland could require independent candidates to file a declaration of candidacy at the same time as partisan candidates and then extend the date for the submission of signatures to the date of the primary election." *Bradley* v. *Mandel*, Civ. No. T-76-638 (D.Md., May 17, 1976) at 11. This statement was merely a rejection of the state's argument that there *was* equal treatment. It does not constitute an endorsement of the present plan. Even if interpreted as a suggestion or endorsement, it is dictum at best. Finally, the court notes that this so-called "suggestion" does not include *any* signatures to be filed by the early deadline. While the early filing of signatures is not at issue in this case, the discrepancy does weaken the defendants' argument of court endorsement of the present law.

must officially throw their hats into the political ring." *Anderson* v. *Celebrezze, supra,* at 22.

Most of the previous opinions relied upon by parties are based on somewhat different facts. Perhaps most on the point is *MacBride* v. *Exon,* 558 F.2d 443 (8th Cir. 1977). That case involved a challenge to a Nebraska law which allowed no Independent candidates on the ballot. A candidate other than a major party candidate could get on the ballot only by being the candidate of a third-party; third parties were required to meet certain qualifications in advance of the primary election. The court ruled it unconstitutional to have no procedure by which a candidate other than a major party candidate could receive a place on the ballot after the primary. *Id.* at 449. Most of the other cases cited by the plaintiffs are distinguishable, since filing deadlines were struck down only in conjunction with other requirements, such as filing of petitions. As indicated earlier, the only issue before this Court is whether the filing deadline by itself is unconstitutional.

There is one case cited by the defendants which suggests that filing deadlines for Independent candidates before the primary election may be justified. *Socialist Labor Party* v. *Rhodes,* 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd. sub nom. Sweetenham* v. *Gilligan,* 409 U.S. 942 (1972). In reaching the conclusion that Independent candidates for Congress and Governor could be required to file before the primary the court commented that "one may not play dog in a political manger by withholding his determination of candidacy until after party candidates are chosen by the primary process." *Id.* at 1273. Even if this is a compelling state interest (and this Court does not so rule in this case), it would not justify a deadline for Independent candidates for President months before the party conventions, since party nominees for President are not chosen until then.

The state has suggested no compelling state interest which would justify the March 3 filing deadline for Independent candidates for President. While administrative needs obviously justify some deadline, this interest does not justify such an early deadline. Therefore, the Court finds that the early deadline for filing a certificate of candidacy imposed on Independent candidates for President by Ann. Code of Maryland, Article 33, §§ 7-1 and 4A-3, is unconstitutional in that it requires Independent candidates to file their candidacies months before the parties designate their nominees, and no compelling state interest has been shown to justify this additional burden on Independent candidates. Because the early deadline for filing the certificate of candidacy is unconstitutional, the early deadline for filing a portion of the petitions must also fall. The Court need not determine the earliest deadline which could be justified by compelling state interests. It does find, however, that no interests have been shown which would justify a deadline for filing the certificate of candidacy or the petitions earlier than August 4, the date currently set by law as the final petition deadline.

In so ruling, the Court emphasizes that it does not rule one way or the other on the constitutionality of "sore loser" provisions as they apply to presidential candidates. Nor does it reach the issue of the constitutionality of Maryland's early deadline for Independent candidates for other offices to file their certificates of candidacy.

Accordingly, it is this 6th day of August, 1980, by the United States District Court for the District of Maryland, ORDERED:

1. That the defendants place plaintiff Anderson on the general election ballot as an Independent candidate for President of the United States if the petitions filed by

his campaign on or before August 4, 1980, otherwise meet the requirements of Maryland law; and

2. That a copy of this opinion be sent to counsel for the parties.

/s/ [Illegible]
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. Y-80-1632

JOHN B. ANDERSON; D. A. BERT BOOTH;
KEVIN P. MCCLEAF; GERALD M. EISENSTAT

v.

WILLIARD A. MORRIS in his official capacity as State Administrator of the Election Laws, State Administrative Board of Election Laws; THEODORE N. CLARK in his official capacity as Chairman of the State Administrative Board of Election Laws; JAMES W. JOHNSON in his official capacity as Vice-Chairman of the State Administrative Board of Election Laws; REGINALD A. ASPLEN in his official capacity as a member of the State Board of Election Laws; KAREN LANCASTER in her official capacity as a member of the State Administrative Board of Election Laws; SYLVIA RAPHAEL in her official capacity as a member of the State Administrative Board of Election Laws; STATE ADMINISTRATIVE BOARD OF ELECTION LAWS

JUDGMENT

In accordance with the Memorandum Opinion and Order of the Honorable Joseph H. Young filed August 6, 1980 in the above entitled case, it is

ORDERED AND ADJUDGED:

That the defendants place plaintiff John B. Anderson on the general election ballot as an Independent candidate for President of the United States if the petitions filed by his campaign on or before August 4, 1980 otherwise meet the requirements of Maryland law.

Dated at Baltimore, Maryland this 6th day of August, 1980.

PAUL R. SCHLITZ, Clerk

By: /s/ R. Bruce McElhone
R. BRUCE MCELHONE
Deputy Clerk

APPROVED this 6th day of August, 1980.

/s/ Joseph H. Young
JOSEPH H. YOUNG

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-432-M Civil

JOHN B. ANDERSON, JANE EVANS, and
GERALD M. EISENSTAT,
Plaintiffs,

v.

SHIRLEY HOOPER, Secretary of State of the
State of New Mexico,
Defendant.

MEMORANDUM OPINION AND ORDER

This action for declaratory and injunctive relief was filed by the plaintiffs in this case on June 10, 1980. In their Complaint, the plaintiffs claim that the defendant has denied them the rights guaranteed under the due process and equal protection clauses of the Fourteenth Amendment. The plaintiffs have applied for a preliminary injunction in this matter. The defendant has moved to dismiss this suit because of a lack of subject matter jurisdiction and a failure by plaintiffs to state a claim upon which relief can be granted. A hearing on both issues was held on June 27, 1980.

The relevant facts involved in this case are not in dispute. Counsel for the plaintiffs and for the defendant entered into a joint stipulation of facts which was filed in this court on June 26, 1980. The plaintiff, John B. Anderson, is seeking to run as an independent candidate for President of the United States in the 1980 General Election. Plaintiff, Jane Evans, a registered New Mexico voter, wishes to cast her vote in the 1980

General Election for John B. Anderson. Plaintiff, Gerald M. Eisenstat, a registered New Jersey voter, intends to cast his vote in the 1980 General Election for electors pledged to Anderson. Plaintiff Anderson declared his intention to seek the nomination of the Republican Party for President of the United States on June 8, 1979. On February 15, 1980, a committee, pursuant to N.M. Stat. Ann. § 1-8-56 (1978), nominated and certified to the defendant Shirley Hooper, the New Mexico Secretary of State, the name of John B. Anderson as a candidate for the Republican Party in the New Mexico primary election for the office of President of the United States. On February 19, 1980, the defendant notified Mr. Anderson that his name would be placed on the Presidential Primary Election ballot unless he notified her otherwise, in writing, no later than Monday, April 14, 1980, which was the last day a candidate could withdraw from the primary election.

On April 24, 1980, Mr. Anderson notified the defendant that he had withdrawn as a candidate for the Republican presidential nomination, that he intended to seek the presidency as an independent candidate and that his name should be removed from the ballot of the 1980 New Mexico Presidential Primary Election. The defendant subsequently informed Mr. Anderson that his name could not be removed from the ballot because the request for such removal had not been made prior to the April 14 deadline. On June 3, 1980, the primary election was held in New Mexico. The name of John B. Anderson appeared on every Republican ballot in that election.

Mr. Anderson's supporters began obtaining the nominating petition signatures for his candidacy as an Independent on May 19, 1980. By June 3, 1980, Mr. Anderson was ready, willing and able to present to the defendant a declaration of candidacy, a full slate of electors for the presidency and the nominating petitions he had collected. Because of a March 4, 1980 deadline, the defend-

ant would not have accepted these documents if they had been tendered on June 3, 1980.

The plaintiffs' complaint contains three counts. In their first count the plaintiffs claim that the New Mexico filing date applicable to Independent presidential candidates violates the equal protection clause of the Fourteenth Amendment in that it creates an arbitrary distinction between partisan and independent candidates. They also claim it creates another arbitrary distinction between independent candidates for the office of President who decide upon their candidacy prior to March 4, 1980 and those who decide on their independent candidacies after March 4, 1980. The plaintiffs' second count alleges that N.M. Stat. Ann. § 1-8-52 (1978) deprives the plaintiffs of an opportunity to associate for the advancement of political beliefs in derogation of rights secured to them by the First and Fourteenth Amendments of the United States Constitution. The plaintiffs' third count alleges that N.M. Stat. Ann. § 1-8-52 (1978) violates the Supremacy Clause of the United States Constitution in that it is inconsistent with and frustrates the operation of federal laws governing the conduct of presidential elections.

The plaintiffs have requested that this court preliminarily and permanently enjoin the defendant from refusing to accept plaintiff Anderson's declaration of candidacy and nominating petitions and from refusing to certify plaintiff Anderson as an independent candidate for the office of President on the ballot in the November, 1980 New Mexico General Election. They further request a declaration that N.M. Stat. Ann. § 1-8-52 (1978) is invalid because it violates the Supremacy Clause and the First and Fourteenth Amendments to the Constitution of the United States. Although plaintiffs' application for a preliminary injunction was filed prior to the defendant's motion to dismiss, I feel it is appropriate to address the

motion to dismiss first because a decision on that motion may preclude the necessity of addressing plaintiffs' application for a preliminary injunction.

The defendant's motion claims that dismissal of this action is necessary because no case or controversy as required by Article III of the United States Constitution exists and that plaintiff has failed to state a claim upon which relief can be granted. The defendant claims that because plaintiff Anderson has not tendered, nor attempted to tender, his declaration of candidacy and petitions to the defendant, he has failed to present this court with a concrete case or controversy. The joint stipulation of fact filed in this case states that the defendant "would not have accepted plaintiff Anderson's declaration of candidacy, his nominating petitions or his designation of electors for the purpose of including his name as an independent candidate for President on the ballot for the general election, had they been tendered on June 3, 1980." Joint Stipulation of Fact ¶ 40 at 12 (filed June 26, 1980). The defendant claims that the above-quoted stipulation does nothing to reduce the hypothetical nature of this case and that, therefore, the issues presented by the plaintiffs are not yet ripe for judicial decision.

While it is clear that the federal courts cannot constitutionally hear abstract or hypothetical questions, the difference between a hypothetical or abstract question and a "case or controversy" is one of degree. The basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), *citing Railway Mail Association* v. *Corsi*, 327 U.S. 88, 93 (1945). In order to challenge the statute at issue in this case, the plaintiffs must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's

operation or enforcement. *Cf. O'Shea* v. *Littleton*, 414 U.S 488, 494 (1974). It is clear from the joint stipulation of fact that the plaintiffs in this case have a realistic danger of sustaining injury as a result of the statute in question. Pursuant to N.M. Stat. Ann. § 1-8-64 (Supp. 1979) the defendant, the Secretary of State, shall refuse to accept any petitions not complying with N.M. Stat. Ann. §§ 1-8-1 to 63 (1978). It is undisputed that plaintiff Anderson failed to submit his petitions for his independent candidacy by the first Tuesday of March as required under N.M. Stat. Ann. § 1-8-52 (1978). The Secretary of State cannot, therefore, accept those petitions. This inability is even more evident by the fact that in the Election Code it is clear that "shall" is mandatory. N.M. Stat. Ann. § 1-1-3 (1978). The Secretary of State has no choice but to refuse to accept Anderson's petitions. This refusal will mean that plaintiff Anderson will be unable to run as an independent presidential candidate in the General Election in New Mexico. This will undoubtedly cause injury to his national campaign for the presidency of the United States and will adversely affect the rights of the other plaintiffs in this action. It should not be necessary for the plaintiffs to await the consumation of the threatened injury to obtain preventive relief. Impending injury is enough particularly when such injury is certain. *Cf. Babbitt* v. *United Farm Workers Nat'l Union*, at 298. A real and substantial controversy admitting of specific relief as distinguished from an advisory opinion upon a hypothetical state of facts exists here. *Cf. Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937).

The finding of an actual case or controversy in the present suit is further supported by the Supreme Court's affirming two cases attacking petition requirements under Illinois election statutes. In both of those cases the courts addressed the substantive issues even though questions of judiciability or ripeness had been raised. These cases

were commenced prior to the plaintiffs filing any petitions. *Socialist Workers Party* v. *Chicago Board of Elections*, 433 F.Supp. 11, 14 (N.D.Ill. 1977), aff'd 566 F.2d 586 (7th Cir. 1978), aff'd *sub nom. Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979); *Jackson* v. *Ogilvie*, 325 F.Supp. 864, 866 (N.D. Ill.), aff'd 403 U.S. 925 (1971). If a potential candidate is able to complain of petition requirements before a deadline for petitions has arrived, surely the issues are ripe for attack on the validity of deadlines after a deadline has passed. The defendants' motion to dismiss for failure to present a case or controversy will, therefore, be denied.

The defendant also moved this Court to dismiss this action because the plaintiffs had failed to state a claim upon which relief may be granted. The defendant argues that even if this Court were to find N. M. Stat. Ann. § 1-8-52 (1978) unconstitutional other New Mexico statutes would prevent the placing of plaintiff Anderson's name on the 1980 general election ballot. The defendant claims that N.M. Stat. Ann. §§1-8-19 and 1-10-7 (1978) are applicable to plaintiff Anderson, who ran in the Republican Presidential primary, and, therefore, his name cannot appear on the 1980 general election ballot. Section 1-8-19, which was enacted in 1975 as part of the Primary Election Law, provides:

> If a person has been a candidate for the nomination of a major political party in the primary election, he shall not have his name printed on the ballot at the next succeeding general election under any party name or party emblem except the party name on his declaration of candidacy filed for such primary election.

Section 1-10-7, which was enacted in 1977 and amended in 1979, provides:

> Except in the case of a candidate for the United States senate or United States representative who is also a candidate for president or vice president of the United States, no candidate's name shall appear more than once on the ballot. Whenever a person is, with his knowledge and consent, a candidate at any nominating convention or primary for nomination as the candidate of any political party for any office to be voted on at the election to be held next after such convention or primary, his name shall not be printed on the ballot at such election in the column under the party name and emblem of any other party.

The defendant argues that because plaintiff Anderson ran in the Republican presidential primary he is ineligible to run as an independent in the general election. The plaintiffs maintain that these two statutes are not applicable to Anderson because (1) they apply only to candidates for statewide, county, or legislative office; (2) Anderson would not appear on the general election ballot under any party name or emblem; and (3) Anderson was not a candidate in New Mexico's June 3 presidential primary.[1]

It is clear that these two statutes, commonly referred to as the "sore loser" statutes during this litigation, were enacted to prevent unsuccessful candidates in primary elections from running again in the next succeeding general election. It is not necessary that I address the issue of whether these two statutes are within the valid exer-

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[1] This third basis raised in support of the inapplicability of the two statutes to Anderson is spurious. The plaintiffs argue that because Anderson withdrew his consent to be a candidate in the Republican primary before the primary was actually held he was not a legitimate candidate in the primary pursuant to N.M. Stat. Ann. § 1-10-7 (Supp. 1979). Anderson failed to timely withdraw from the Republican primary so he was a legitimate candidate in the Republican primary.

cise of a legitimate state interest in the proper management of its ballots because I find the statutes to be inapplicable to plaintiff Anderson. Section 1-8-19 is a part of the Primary Election Law (N.M.Stat.Ann. §§ 1-8-10 to 52 (1978)). The Primary Election Law applies to "major party nominations for all offices that are to be filed at the general election with the exception of presidential electors." N.M.Stat.Ann. § 1-8-17 (1978). Under that limitation the presidential primary held in New Mexico on June 3, 1980 does not fit within the purview of the Primary Election Law. The presidential primary merely gives voters the opportunity to express their preference for the person to be the presidential candidate of their party, N.M.Stat.Ann. § 1-8-54 (1978), and as such is regulated in New Mexico by the Presidential Primary Act, N.M.Stat.Ann. §§ 1-8-53 to 63 (1978). The Presidential Primary Act was passed in 1977 by the Legislature and neither contains its own "sore loser" provision nor incorporates the provisions found elsewhere in the Election Code. The only connection apparent in the statutes between the presidential primary election and the primary elections is that they are held on the same date. N.M.Stat.Ann. § 1-8-54 (1978). Plaintiff Anderson was a candidate in the Republican *presidential primary* but not in the Republican *primary*. Sections 1-8-19 and 1-10-7 are inapplicable to plaintiff Anderson and, therefore, do not prevent the placing of his name on the general election ballot.

Even if sections 1-8-19 and 1-10-7 applied to presidential primaries they would not prevent plaintiff Anderson's name from appearing on the general election ballot as an independent. Those two statutes only prevent unsuccessful primary candidates from appearing on the next general election ballot under any party name or party emblem different from that he ran under in the primary. Plaintiff Anderson seeks to run as an independent candidate and as such would be "a candidate without party affiliation for an office to be voted on at a general elec-

tion . . .." N.M. Stat. Ann. § 1-8-45 (1978). In order to have a party name or emblem the chairman of the state central committee of a qualified political party has to file with the Secretary of State a certificate setting forth the name and showing a representation of the emblem. N.M. Stat. Ann. § 1-7-6 (1978). To qualify as a political party, rules and regulations must be filed with the Secretary of State. N.M. Stat. Ann. § 1-7-2 (Supp. 1979). It is difficult to understand how one could be, by definition, "without party affiliation" and at the same time be running for an office under a party name or party emblem.

Defendant argues that § 1-8-19 was enacted prior to New Mexico's election laws allowing for independent candidacies and should be construed to prevent unsuccessful primary candidates from running as independents in the succeeding general election. It is true that § 1-8-19 was enacted in 1975 and the statutory provisions for independent candidates were not enacted until 1977. Section 1-10-7, however, was passed in the same legislative session as the independent candidate provisions and was amended in 1979. It still refers to party names and emblems although the legislature was clearly aware that independent candidates could exist. Under those circumstances I cannot find that the legislature intended anything other than to prevent *party* switching after an unsuccessful primary bid in order to run in the general election.

Sections 1-8-19 and 1-10-7 do not prevent an unsuccessful party primary candidate from running as an independent in the succeeding general election. Plaintiffs have not failed to state a claim upon which relief can be granted. Defendant's motion to dismiss on those grounds shall be denied. It is therefore necessary to address plaintiffs' application for a preliminary injunction. They have requested this Court to enjoin the defendant from continuing to refuse to accept plaintiff

Anderson's declaration of candidacy, nominating petitions, and designation of electors for the purpose of qualifying Anderson to appear on the ballot in New Mexico's general election as an independent candidate for president.

In order to be entitled to any preliminary injunction in this matter, the plaintiffs must show that they have a substantial likelihood of success on the merits and that if a preliminary injunction is not granted they will suffer irreparable injury. Plaintiffs challenge the constitutionality of N.M. Stat. Ann. § 1-8-52 (1978) on two related bases. First, the plaintiffs claim that the early filing deadline impermissibly burdens their constitutional rights. The rights which the plaintiffs claim are burdened are the right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights have been deemed to be fundamental rights by the United States Supreme Court. *Illinois State Bd. of Elections* v. *Socialists Workers Party*, 440 U.S. 173, 185 (1978). The plaintiffs allege that to require an independent candidate to decide to run and to complete the necessary formalities by March 4, 1980 interferes with their rights of association and effective voting.

Secondly, the plaintiffs assert that the early filing deadline applicable only to those wishing to run as an independent candidate in the general election denies plaintiff Anderson the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. The New Mexico Election Code sets up different filing deadlines for different types of candidates. Independent candidates for president must file their declarations of candidacy and nominating petitions by March 4, 1980. The major and minor parties do not need to designate their nominees for president until September

15, 1980. Plaintiffs claim that this six-month difference as to when presidential candidates must be named results in an arbitrary and invidious discrimination against independent presidential candidates, as distinguished from partisan candidates.[2]

The importance of the plaintiffs' interests which are at stake is undeniable. The right of individuals to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively both rank among this country's most precious freedoms. *Williams* v. *Rhodes*, 393 U.S. 23 (1968). When ballot access is restricted by statutory requirements, as it is in this case by the March 4 deadline, the State must show a compelling interest which is furthered by its requirements. *Cf. Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. at 184.

There are a number of interests that states have historically proffered as reasons for limiting access to the ballot. The defendant in this case has not offered any reason which could justify a March filing date for an independent presidential candidate and a September deadline for the naming of partisan presidential candidates. Certainly the State of New Mexico can further its interests in limiting ballot access by having deadlines. Such deadlines, however, should be uniform for candidates for the same office. The State does have an interest in keeping its ballots manageable, in protecting the integrity of the political process from frivolous candidates and in the stability of the political system. These interests are not furthered by having an extraordinarily early deadline for presidential independent candidates.

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[2] Plaintiff also argues that the deadline also creates an invidious classification between serious independent candidates deciding to run before March 4, 1980 and those deciding to run after March 4, 1980. Because of my determination on the equal protection based on an arbitrary classification between independent and partisan candidates, I decline to address that issue at this time.

Under the facts in this case, I cannot find that any state interest is furthered by the March 4 deadline for independents. The burden placed on the plaintiffs' fundamental rights and the classification between partisan and independent presidential candidates can be allowed only if the State has a compelling interest at stake. The defendant has failed to offer any compelling interests which the State may further in having such an early filing deadline for independent candidates for president. Under the circumstances, I find that the plaintiff has a substantial likelihood of success on the merits in this case.

Inquiry must next be made as to whether or not the plaintiffs will sustain irreparable injury if a preliminary injunction is not issued during the pendency of this litigation. I find that such injury would occur if I failed to issue a preliminary injunction. The general election will occur in a few months. If plaintiff Anderson's name does not appear on the general election ballot there would be no adequate remedy at law to compensate him for this injury should he prevail in the final judgment. Furthermore, the rights of the other plaintiffs in this action of being able to cast their votes effectively for the candidate of their choice would be irreparably harmed. The irreparable injury which will occur to the plaintiffs if a preliminary injunction is not issued is not outweighed by any possibility of harm to the defendant or by any public interest. The defendant has argued that the State of New Mexico will be harmed if she is unable to enforce the filing deadlines. There has been no indication that the defendant will be inundated with declarations of candidacy and petitions from other potential independent candidates if she is not allowed to enforce the March 4, 1980 filing deadline for independent candidates for the general election. If the ballots were already printed and an election was imminent equitable considerations might justify this Court withholding immediate

relief. Here, however, the defendant has sufficient time and resources to put Mr. Anderson's name on the ballot. Given the clear unconstitutionality of N.M. Stat. Ann. § 1-8-52 (1978) on its face and as applied to Mr. Anderson, denying a preliminary injunction would be inequitable. The defendant shall be preliminarily enjoined from continuing to refuse to accept plaintiff Anderson's declaration of candidacy and nominating petitions and from refusing to certify plaintiff Anderson as an independent candidate for the office of president on the ballot in the November, 1980 New Mexico General election. Now, Therefore,

IT IS ORDERED that defendant's motion to dismiss be, and hereby is, denied.

IT IS FURTHER ORDERED that plaintiff's application for preliminary injunction be, and hereby is, granted.

/s/ [Illegible]
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-432-M Civil

JOHN B. ANDERSON, JANE EVANS, and
GERALD M. EISENSTAT,
Plaintiffs,

v.

SHIRLEY HOOPER, Secretary of State
of the State of New Mexico,
Defendant.

PRELIMINARY INJUNCTION

Plaintiffs in this action having filed a motion for a Preliminary Injunction and having, on June 27, 1980, heard testimony and taken evidence and being otherwise fully advised in the premises, I find that the motion is well taken for the reasons stated in my Memorandum Opinion and Order entered this date. Now, Therefore,

IT IS ORDERED that defendant Shirley Hooper is hereby enjoined from refusing to accept plaintiff Anderson's declaration of candidacy and nominating petitions as an independent candidate for the presidency of the United States in the 1980 General Election. Assuming the audit of the petitions indicate the signature requirements for nomination have been met, defendant Shirley Hooper shall refrain from refusing to certify plaintiff Anderson as an independent presidential candidate in that election during the pendency of this action.

/s/ [Illegible]
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-432-M Civil

JOHN B. ANDERSON, JANE EVANS, and
GERALD M. EISENSTAT,
Plaintiffs,

v.

SHIRLEY HOOPER, Secretary of State
of the State of New Mexico,
Defendant.

MEMORANDUM OPINION AND ORDER

This matter comes up for consideration on cross motions for summary judgment filed by the plaintiffs and the defendant in this matter. The plaintiffs have also requested this court to make the preliminary injunction previously entered in this case a permanent injunction. Having considered the motions as well as the briefs filed by counsel and the supplemental joint stipulation of fact filed by the parties, I find that plaintiffs' motion for summary judgment is well taken in part.

The preliminary injunction previously granted in this matter enjoined the defendant from refusing to accept plaintiff Anderson's declaration of candidacy and nominating petitions during the pendency of the litigation. When granting the preliminary injunction I stated that the importance of the rights and interests asserted by plaintiffs in this action mandated that the State show a compelling interest furthered by its deadline requirements in order for the statute in question to be constitutional under the First and Fourteenth Amendments of the United States Constitution. The defendant in this case has failed to sustain this burden of showing such a com-

pelling interest. Partial summary judgment in favor of the plaintiffs as to Counts I and II is, therefore, appropriate in this case. Summary judgment in favor of the plaintiffs is entered only on the allegations that the statute impermissively burdens fundamental rights and denies plaintiff Anderson the equal protection of the laws of the United States. The determination that this statute denies plaintiff Anderson the equal protection guaranteed by the Fourteenth Amendment is based on a finding that the statute invidiously discriminates against independent presidential candidates as distinguished from partisan candidates. I decline to address plaintiffs' allegation that the deadline also creates an invidious classification between serious independent candidates deciding to run before March 4, 1980 and those deciding to run after March 4, 1980.

Plaintiffs have failed to show that the early deadline statute violates the Supremacy Clause of the United States Constitution. Summary judgment in favor of defendant is, therefore, appropriate as to Count III of the Complaint.

Defendant's motion for summary judgment also included a request that this court set a deadline for independent candidates seeking access to the 1980 General Election Ballot. This request was made because the New Mexico Legislature will not meet again until 1981 and the defendant is in need of an interim deadline which she can use to control the timing for filing nominating papers by independent candidates in the 1980 general election. Defendant has requested the date of August 15, 1980 as the filing deadline for independents in the 1980 general election. While I feel that the reasons for requesting August 15 put forth by the defendant are appropriate I feel compelled to give adequate notice to potential independent candidates so that they may have sufficient time to file their declaration of independent can-

didacy and gather the signatures for their nominating petitions. I shall, therefore, set August 20, 1980 as the deadline for potential independent candidates to submit the appropriate papers to the Secretary of State of New Mexico to achieve ballot position for the 1980 General Election.

Plaintiffs also requested that this Court enter a permanent injunction in this case. Because of my determination on the summary judgment motions I find that a permanent injunction should be entered.

Plaintiffs have also requested that I grant them their costs and reasonable attorneys' fees which were incurred in bringing this action. I shall postpone a decision on this request until such time as the defendant Shirley Hooper has a reasonable amount of time to respond to the plaintiffs' request. Now, Therefore,

IT IS ORDERED that plaintiffs' motion for summary judgment shall be granted as to Counts I and II of their complaint filed in this action on June 10, 1980 and shall be denied as to Count III of that complaint.

IT IS FURTHER ORDERED that defendant's motion for summary judgment shall be denied as to Counts I and II of the complaint filed in this action and shall be granted as to Count III of the complaint.

IT IS FURTHER ORDERED that the date of August 20, 1980 shall serve as the final filing date for the appropriate papers for all those wishing to appear as independent candidates on the ballot for the 1980 General Election.

IT IS FURTHER ORDERED that the preliminary injunction entered in this matter on July 8, 1980 shall be made permanent.

IT IS FURTHER ORDERED that a decision on plaintiffs' request for attorneys' fees and costs to be awarded

against defendants shall be deferred until such time as defendants have had an adequate opportunity to respond to that request.

/s/ [Illegible]
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 80-17

PERCY L. GREAVES, ET AL.,
Plaintiffs,

vs.

FRANCES JONES MILLS, ET AL.,
Defendants.

Civil Action No. 80-18

JOHN B. ANDERSON, ET AL.,
Plaintiffs,

vs.

FRANCES JONES MILLS, ET AL.,
Defendants.

MEMORANDUM OPINION

In Civil Action No. 80-18 (hereinafter "Anderson case"), plaintiff, John B. Anderson, a citizen and Congressman from Illinois, is an independent presidential candidate seeking to be placed on the ballot in the November general election in Kentucky. Other plaintiffs are Joseph C. Greaves, Jr., a citizen of Kentucky, and a person who is pledged to be an elector for Congressman Anderson in his presidential race; and Gerald M. Eisenstadt, a citizen of New Jersey, and a supporter of Anderson for President.

In Civil Action 80-17 (hereinafter "Greaves case"), plaintiff Percy L. Greaves is a citizen of New York and is also an independent presidential candidate, seeking to be placed on the ballot in November. Other plaintiffs

are Dr. Wasley Krogdahl, Margaret Krogdahl, and Robert Vessels, all citizens of Kentucky, and supporters of Greaves for President. Dr. Krogdahl also seeks to have his name placed as an elector for plaintiff Greaves for President.

The defendants in both cases are Frances Jones Mills, the Secretary of State, and members of the State Board of Elections. In addition, in Civil Action No. 80-17, Brady A. Miracle, the Executive Director of the Board of Elections, is a party defendant. The responsibility of Mrs. Mills and the Board of Elections is to administer elections in Kentucky, and to issue certificates of election for successful candidates. KRS Chapters 117-118. Petitions and certificates for nomination for electors of President and Vice President of the United States are to be filed with the Secretary of State. KRS 118.365 (4).

The two cases have been consolidated pursuant to Rule 42(A), Federal Rules of Civil Procedure, and have come before the Court on cross motions for summary judgment. The Court commends the parties for their diligence in getting the record ready for a decision, especially in their stipulation in the facts. As there does not appear to be any genuine issue of material fact, this is an appropriate case for summary judgment under Rule 56, Federal Rules of Civil Procedure. *See Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970).

ANDERSON'S CASE

Congressman Anderson originally was a candidate for the Republican nomination for President. However, on April 24, 1980, he announced publicly his intention to withdraw as a Republican candidate and to run as an independent. He attempted to have his name stricken in the Republican primary, but the Secretary of State said his withdrawal was untimely, and he was defeated

in the Kentucky Republican primary on May 27, 1980, by Ronald Reagan. This Court denied him preliminary relief to be stricken from the ballot. *See Anderson* v. *Mills*, —— F.Supp. —— (Civ. No. 80-18 E.D. Ky. June 10, 1980).

On May 27, 1980, Anderson's supporters presented to the Secretary of State a petition for his name to be placed on the ballot in November and to name qualified electors for him and a candidate for Vice President. The petitions complied with the requirements of KRS 118.315, including 8600 names thereon. However, the Secretary of State rejected it as being untimely. She maintained that the petition had to be filed on or before April 2, 1980, in accordance with KRS 118.365(3); and that Anderson was disqualified under the "sore loser" law, KRS 118.345, as he had been defeated in the primary election.

GREAVES' CASE

In the companion case involving Percy L. Greaves, his supporters on April 1, 1980, presented to the Secretary of State a petition for his placement on the November ballot. This petition was also legally sufficient in all respects save one, at least according to the Secretary of State. Whereas the Anderson petition had a sufficient number of signatures but was untimely, this petition for Greaves was timely but had an insufficient number of signatures. It had 1,086 signatures, thus short of 5,000 required under KRS 118.315(2).

RELIEF SOUGHT

Although the Anderson case was originally brought under the diversity jurisdiction of this Court, pursuant to 28 U.S.C. § 1332 (as Anderson was then the only plaintiff), the complaint was subsequently amended. Both cases now seek injunctive and declaratory relief under

28 U.S.C. §§ 1331, 1343(3) and 2201-02, incorporating 42 U.S.C. § 1983. The plaintiffs in the Greaves case also assert their rights under 28 U.S.C. § 2284 and 42 U.S.C. § 1982, but the Court finds those statutes inapplicable.

Nevertheless, this Court has jurisdiction of the matter under 28 U.S.C. §§ 1343(3) and 2201-02, incorporating 42 U.S.C. § 1983. There might be some question of this Court's jurisdiction under 28 U.S.C. § 1331, inasmuch as there must be $10,000 in controversy. In the Anderson case, there is proof of more than that amount in controversy, *see Anderson* v. *Mills*, *supra*, but in the Greaves case, there is not. Therefore the Court will decline to rule on that issue, for jurisdiction is already predicated under 28 U.S.C. § 1343.

Plaintiffs seeks to redress rights under various parts of the Constitution, including Article II, Section 1, Article IV, Article VI, and the First, Fifth, Ninth, Twelfth, and Fourteenth Amendments. Both candidates desire the Secretary of State to be directed to place their names on the November general election ballot.

ABSTENTION

The first issue to be reached is whether this Court should abstain from deciding the case until a state court is allowed to pass on the issue of state law, under the rule from *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). Assuming there was time to obtain relief in a state court, the issues in this case seem appropriate for abstention. There is ample uncertainty in the state law involved here, as will be seen *infra*, and a decision by a state court that KRS 118.365(3) and 118.345 are not applicable to presidential elections would obviate the need to consider most, if not all, of the constitutional issues here.

The rule favoring abstention is based upon a need for courts to avoid decisions of constitutional issues whenever

possible. *See Siler* v. *L. & N. R.R.*, 213 U.S. 175 (1909). Thus, where, as here, the challenged state statute is susceptible of an interpretation by the state courts that would avoid the federal constitutional question, then abstention is appropriate. *See Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 306 (1979).

On the other hand, time here is of the essence. Political campaigns are not started like a motor vehicle. They require time to organize and raise funds. If this Court were to abstain now in favor of a state proceeding, the parties might not obtain more than a decision of a state circuit court, as an appeal would not be likely completed before November. There are, as of the time of the opinion, fewer than 90 days remaining until the general election in November. Although the time for abstention here is not as short as in *Kay* v. *Austin*, 621 F.2d 809 (6th Cir. 1980), nevertheless, the same reasoning applies here, precluding abstention. Moreover, it is doubtful whether the issue raised by Greaves concerning the requirement of 5000 signatures on the ballot, could be decided in any way under the state law without raising a constitutional question. Therefore, the Court declines to abstain under the circumstances of these cases.

STATE STATUTES

When the constitutionality of a state statute is brought into question, if the Court can decide it on other than constitutional grounds, it should do so. *See Siler* v. *L. & N. R.R.*, *supra*. Moreover, if the constitutionality of a statute is challenged, the Court should try not to destroy it but to construe it, if consistent with the will of the legislature, so as to comport with constitutional limitations. *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 571 (1973); *Kay* v. *Austin*, *supra*.

1. *Filing Deadline.*

KRS 118.365(4) provides in part:

> Petitions and certificates of nomination for electors of President and Vice President of the United States shall be filed with the secretary of state not less than fifty-five (55) days prior to the date fixed by law for the election of such electors.

That language clearly says petitions for presidential electors are to be filed on or before 55 days preceding the November general election. Otherwise, the use of the word "petition" would be considered as surplusage, as maintained by the defendants. All parties readily admit that the major parties, Republicans and Democrats, do not nominate their candidates until July and August. Thus, the language in this statute about "certificates of nomination" clearly applies to the procedures for nomination by convention applicable to party candidates under KRS 118.325(2).

Defendants argue that KRS 118.365(3) applies not only to other candidates but to presidential candidates as well. If the legislature intended that result, it could have easily omitted the word "petitions" in subsection (4) of that statute. Therefore, subsection (4) applies to presidential candidates, so petitions which are otherwise legally sufficient must be accepted by the Secretary of State when filed not less than 55 days before the general election.

Althoug defendants cite *Pratt* v. *Begley*, 352 F.Supp. 328 (E.D. Ky. 1970) (three-judge court), *aff'd*, 409 U.S. 943 (1972), in support of their argument that the earlier deadline of April 2, is not unconstitutional, that case is not applicable here. It involved the filing deadline for members of Congress and did not concern this specific provision, KRS 118.365(4), for President. Thus, that deadline for congressional candidates put the independent on the same time table as party candidates. Here, as party candidates do not have to be named until a date 55

days before the general election, it is only logical to believe that it is the same deadline required for independent candidates.

2. *"Sore Loser" provision.*

The "sore loser" provision of KRS 118.345 does not apply to presidential candidates. It provides in part as follows:

> (1) No candidate who has been defeated for the nomination for any office in a primary election shall have his name placed on voting machines in the succeeding regular election as a candidate for the same office for the nomination to which he was a candidate in the primary election, except that if a vacancy occurs in the party nomination for which he was a candidate in the primary election his name may be placed on voting machines for the regular election as a candidate of that party if he has been duly made such party nominee after the vacancy occurs as provided in KRS 118.105.

A New Mexico statute somewhat similar to this law was held inapplicable to the presidential election there. *See Anderson* v. *Hooper*, —— F.Supp. —— (No. 80-432-M.D.N.M. July 9, 1980). Apart from that decision, however, the language of the Kentucky statute is clearly not applicable to presidential elections, for the candidate is not defeated in Kentucky in the primary election. Defeat only comes at the convention. To decide otherwise might preclude the ultimate nominee at the convention from appearing on the general election ballot, if he lost the Kentucky primary election. Obviously, that result was never intended by the Kentucky General Assembly.

Moreover, as all parties agree, the "sore loser" law was in effect for some time before the presidential primary election law was enacted in Kentucky in 1976. Although KRS 118.345 was amended in 1974, when the

presidential primary law, KRS 118.550 et seq., was passed, there is no legislative history to demonstrate that the Kentucky legislature meant to include presidential candidates under KRS 118.345. The defendants here have agreed that Kentucky law does not specifically contemplate independent candidates for president.

3. *Signature Requirement.*

KRS 118.315(2) provides:

> A petition of nomination for a state officer, or any officer for whom all the electors of the state are entitled to vote, shall contain five thousand (5,000) petitioners; . . . . The petition shall state . . . that he [the candidate] is legally qualified to hold the office, and that the subscribers desire, and are legally qualified, to vote for the candidate.

Before 1978, the law required only 1,000 signatures for a state-wide office. Plaintiff Anderson is not concerned with this statute, for his petition had more than 5,000 signatures. However, the plaintiffs in the Greaves case maintain that this statute violates rights under the First, Fifth and Fourteenth Amendments to the Constitution. Specifically, they assert that it infringes upon their right to association and expression, denies them equal protection of the law, and denies them their right of franchise without due process of law. They do not allege any specific Fifth Amendment violations, however, and the Court finds none.

This statute cannot be interpreted so as to avoid the constitutional issue; it clearly applies to an independent candidate for President. The requirement of 5,000 signatures is clearly constitutional. This number of voters necessary to sign the petition is less than one per cent (actually about 0.03%) of the eligible pool of voters in Kentucky. In addition, there are no geographical limitations, closed-in time limitations, or requirements for

the persons signing the petition, except that they be qualified voters who assert that the candidate is qualified and they desire to vote for him. This statute has apparently not been unduly restrictive for Congressman Anderson, or third-party candidates for the Libertarian Party, Respect for Life Party, Socialist Workers Party, Citizens Party, and the Communist Party. They have filed petitions with more than 5,000 signatures each, even though some of them have not appeared on the Kentucky ballot before, and some of those better known, such as the Socialist Workers Party and the Communist Party, have received fewer than 1,000 votes in the last two presidential elections in Kentucky.

There is ample authority for upholding a minimum petition requirement such as this. In *Jenness* v. *Fortson*, 403 U.S. 431 (1971), the Georgia law requiring the signatures of five per cent of the total eligible electorate was upheld and determined not to violate the freedoms of speech and association guaranteed under the First and Fourteenth Amendments. Moreover, the Court held that this law did not deny nonparty candidates to equal protection of the laws under the Fourteenth Amendment. The state has an interest in requiring "some preliminary showing of a significant modicum of support," *id.* at 442, before placing the name of the candidate on the ballot, if for no other reason, to avoid "confusion, deception and even frustration of the democratic process at the general election." *Id. Accord, American Party of Texas* v. *White*, 415 U.S. 767 (1974), (upholding a requirement of 1% of the vote cast for governor in the last general election). Unlike *Storer* v. *Brown*, 415 U.S. 724 (1974), there is no disqualification here of a person who voted in the primary. Under Kentucky law, one is disqualified if he or she signed another petition for the same office, but the defendants do not check petitions for this and have not asserted this as a bar to any petition filed here.

Plaintiffs in the Greaves case also say that the signature requirement statute is unconstitutional because those signing the petition must express their desire to vote for the named candidate. They maintain that this is not required for party candidates, and that it forces persons to reveal their support for a candidate, thus violating their right to a secret ballot, and their freedoms guaranteed under the First and Fourteenth Amendments. This is a unique argument, and the parties have cited no authority in support of it. The Court finds that those signing this petition do little more than those signing other petitions, less indicative of their voting preferences, such as those found in California law in *Storer* v. *Brown*, *supra*, or Texas law, in *American Party of Texas* v. *White*, *supra*. The same compelling state interest that existed in those cases exists here and is sufficient to uphold the requirement of 5,000 signatures. As there is still some time to act, plaintiff Greaves and his supporters may still be able to get on the November ballot, if they can obtain the additional signatures for their petition.

The Court has considered the learned opinions from *Anderson* v. *Morris*, —— F.Supp. —— (No. 4-80-1632 D. Md. Aug. 6, 1980); and *Anderson* v. *Celebrezze*, —— F.Supp. —— (No. C-2-80-400 S.D. Ohio July 18, 1980). Although they are persuasive, they are inapplicable because they decided constitutional issues that were not reached here. Moreover, the constitutionality of the signatures requirement was not decided in those cases.

Therefore, the Court will order the defendant Secretary of State to place the name of John B. Anderson on the general election ballot this November, but will not order the placement of Percy L. Greaves on the ballot, unless by the deadline specified in KRS 118.365(4), that is, 55 days before the general election, he presents a petition to the Secretary of State with the requisite num-

ber (5,000) of qualified signatures thereon. An Order in accordance with this Opinion will be issued.

This 14 day of August, 1980.

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
Judge

A True Copy Attest

Davis T. McGarvey
Clerk
U.S. District Court

By /s/ Hilda T. Watkins
D.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 80-18

JOHN B. ANDERSON, ET AL.,
Plaintiffs,

vs.

FRANCES JONES MILLS, ET AL.,
Defendants.

JUDGMENT

In accordance with the Memorandum Opinion and Order of even date, it is hereby

ORDERED AND ADJUDGED AS FOLLOWS:

1. The petition of nomination for electors for John B. Anderson were filed timely with the defendant Secretary of State.

2. The defendant Secretary of State shall place the name of John B. Anderson on the Kentucky ballot in the November 4, 1980, presidential general election, if his petition has otherwise met the requirements of Kentucky's election laws.

3. The defendants shall pay the costs of this action.

This 14 day of August, 1980.

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
Judge

A True Copy Attest

Davis T. McGarvey
Clerk
U.S. District Court

By /s/ Hilda F. Watkins
D.C.

Notice is hereby given of the entry of this order or judgment on August 15, 1980.

Davis T. McGarvey
Clerk

BY: /s/ Hilda F. Watkins
D.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 80-17

PERCY L. GREAVES, ET AL.,
Plaintiffs,

VS.

FRANCES JONES MILLS, ET AL.,
Defendants.

Civil Action No. 80-18

JOHN B. ANDERSON, ET AL.,
Plaintiffs,

VS.

FRANCES JONES MILLS, ET AL.,
Defendants.

ORDER

In accordance with the Memorandum Opinion of even date, it is hereby

ORDERED AS FOLLOWS:

1. The motion for summary judgment by plaintiffs John B. Anderson and others in Civil Action No. 80-18, filed on July 11, 1980, be and is sustained.

2. The motion for summary judgment by the defendants in Civil Action No. 80-18, as filed on July 11, 1980, be and is denied.

3. The motion for summary judgment by the plaintiffs, Percy L. Greaves and others, in Civil Action No. 80-17, filed on July 14, 1980, be and is sustained in part and denied in part.

4. The motion for a temporary injunction by the plaintiffs, Percy L. Greaves and others, in Civil Action No. 80-17, filed on July 14, 1980, be and is denied.

5. The motion for summary judgment filed by the defendants on July 11, 1980, in Civil Action No. 80-17 be and is sustained in part and denied in part.

6. The issue of awarding attorney's fees is specifically reserved.

This 14 day of August, 1980.

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
Judge

A True Copy Attest

Davis T. McGarvey
Clerk
U.S. District Court

By /s/ Hilda F. Watkins
D.C.